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FEAR AND LOATHING IN COLORADO: INVOKING THE SUPREME COURT'S STATE-CONTROVERSY JURISDICTION TO CHALLENGE THE MARIJUANA- LEGALIZATION EXPERIMENT

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Abstract: This Article asserts that states may invoke the Supreme Court's original jurisdiction to challenge marijuana legalization in Colorado. The State's introduction of marijuana into interstate commerce has reawakened a long-dormant body of constitutional law dealing with transboundary nuisance disputes between states. In making this argument, we distinguish our theory from the complaint lodged by Nebraska and Oklahoma with the Supreme Court. Nebraska and Oklahoma seek to enforce the Supremacy Clause of the U.S. Constitution, contending that Colorado's venture violates the federal Controlled Substances Act. In contrast, we assert that the Court should award damages to a prevailing state, using the Coase Theorem of market efficiency as its guide. Real-world application of this Theorem can be attained by imposing a legal rule charging the nuisance with the damages it causes. If compelling a polluter to internalize the cost of its pollution drives it out of business, then the enterprise was not the most economically efficient use of the property. In contrast, if the polluter assumes responsibility for all the costs of the venture and still realizes a sufficient profit to stay in business, then its use of the land is most efficient. If this remedy is applied, the market will determine the success or failure of Colorado's venture and will serve as a guide to other states in deciding whether it is worth emulating.

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*One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. . . . Yet, whenever . . . the action of one state reaches . . . into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and [the Supreme Court] is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.*¹

INTRODUCTION

Louis Brandeis famously observed that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”² In the wake of Colorado’s decriminalization of recreational marijuana,³ Justice Brandeis’s adage has

¹ *Kansas v. Colorado (Kansas II)*, 206 U.S. 46, 97–98 (1907).

² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³ COLO. CONST. art. XVIII, § 16. In 2012, Washington voters also passed a referendum decriminalizing the sale of recreational marijuana. Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES (Nov. 7, 2012), http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?_r=0 [<http://perma.cc/26TJ-JKSN>]. Oregon and Alaska followed suit in 2014. Niraj Chokshi, *Alaska Legalizes Marijuana Today. Here’s How Its Law Compares to All the Others*, WASH. POST (Feb. 24, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/24/alaska-legalizes-marijuana-today-heres-how-its-law-compares-to-all-the-others/> [<http://perma.cc/34Q4-DRGF>]. Because Alaska does not share a border with any other state, we believe it is largely immune from the arguments we present in this Article. Oregon does not plan to permit the retail sale of recreational marijuana until the fall of 2016. *Recreational Marijuana: Frequently Asked Questions*, OREGON.GOV, <http://www.oregon.gov/olcc/marijuana/Pages/Frequently-Asked-Questions.aspx> [<http://perma.cc/KQ5D-JWLU>]. Washington was more cautious and deliberative with its program than Colorado, delaying the implementation of recreational marijuana sales in order to explore safeguards that may limit diversion out of the state. Gene Johnson, *Bumpy Road for Marijuana Legalization in Washington*, DENVER POST (July 1, 2014), http://www.denverpost.com/marijuana/ci_26064762/bumpy-road-marijuana-legalization-washington [<http://perma.cc/77DZ-XLBB>]. Washington’s first licensed dispensary opened on July 8, 2014. Katy Steinmetz, *Washington State Is Low on Legal Pot*, TIME (July 1, 2014), <http://time.com/2946014/marijuana-pot-legalization-washington/> [<http://perma.cc/SV2B-RNVK>]. Due to Washington’s more rigorous licensing process and local ordinances only around eighty-five dispensaries are presently open. *Washington State Growers Struggling to Sell Legal Marijuana*, FOX NEWS (Jan. 16, 2015), <http://www.foxnews.com/us/2015/01/16/washington-state-growers-struggling-to-sell-legal-marijuana/> [<http://perma.cc/S8AK-EBFZ>]. In contrast, when Colorado rolled out its commercial pot market in 2014, it promptly issued licenses to 348 retailers, covering all corners of the state. John Ingold, *Colorado Issues First Licenses for Recreational Marijuana Businesses*, DENVER POST (Dec. 23, 2013), http://www.denverpost.com/news/ci_24784227/colorado-issues-first-licenses-recreational-marijuana-businesses [<http://perma.cc/TU5A-B59B>]. As the full scope of Oregon’s and Washington’s regimes remain to be seen, we have limited our analysis to Colorado’s program. If Washington’s or Oregon’s programs ultimately expand to a scale approaching Colorado’s, the arguments we present herein will apply with equal vigor to those states as well.

become a shibboleth frequently wielded by pot-legalization advocates.⁴ But the popular culture's exuberant embrace of the marijuana-legalization experiment,⁵ undoubtedly fueled by the immense wealth the industry—"Big Cannabis"⁶—promises to generate, ignores a crucial caveat to this oft-quoted metaphor. The Constitution permits states to "try novel social and economic experiments" only when such measures come "*without risk to the rest of the country.*"⁷

This is so because the Constitution imposes "an affirmative duty" on states to protect their neighbors from harm emanating from their territory.⁸

⁴ E.g., Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015) (arguing that "[u]nprecedented public support for legalizing marijuana has emboldened Brandeisian experimentation across the country"); Nathaniel Counts, *Initiative 502 and Conflicting State and Federal Law*, 49 GONZ. L. REV. 187, 201 (2013) ("As one of the first two states to legalize marijuana after the passage of the [Controlled Substances Act], the citizens of Washington may see themselves as fulfilling the purpose of a federal system, where 'a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (quoting *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting))); Charles F. Manski, *Drug Control Policy in an Uncertain World*, 91 OR. L. REV. 997, 1008 (2013) (arguing that "[t]he recent 2012 decisions by Washington and Colorado to eliminate state penalties for recreational use of marijuana" are a good example of Justice Brandeis's mantra); Jacob Sullum, *The Cannabis Is Out of the Bag: Why Prohibitionists Have an Interest in Allowing Marijuana Legalization*, REASON, Aug. 1, 2013, at 12 (calling Colorado and Washington "laboratories of democracy"); Joseph Tutro, *States Are Making Their Own Decisions Regarding Whether Marijuana Should Be Illegal: How Should the Federal Government React?*, 9 TENN. J.L. & POL'Y 233, 244 (2013) (arguing that Colorado's decriminalization of marijuana "is the ultimate 'novel social and economic experiment[]'" (quoting *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting))); Michael Vitiello, *Joints or the Joint: Colorado and Washington Square Off Against the United States*, 91 OR. L. REV. 1009, 1028 (2013) (arguing that giving Colorado the "latitude to implement" its marijuana-legalization experiment exemplifies "Justice Brandeis' dictum that the states are the laboratory for democracy").

⁵ Marc Mauer, *Welcome Dinner: "The Drug War and Its Social Implications,"* 13 CHAP. L. REV. 695, 701 (2010) (stating that "we have marijuana being celebrated in popular culture"). As one commentator recently noted:

Over the past several years, many commentators, including myself, have predicted that we are on the road to legalizing marijuana. More recently, with the passage of initiatives in Colorado and Washington "legalizing" marijuana, headlines in the mainstream media have echoed that view. For example, a CNN headline touted those initiatives as "the biggest victory ever for the legalization movement." The *Wall Street Journal* ran a headline asking "Reefer Madness or Investment Opportunity?" with a clear implication that marijuana may provide a lucrative investment opportunity.

Vitiello, *supra* note 4, at 1009–10 (citations omitted).

⁶ Rory Carroll, *Big Cannabis: Will Legal Weed Grow to Be America's Next Corporate Titan?*, THE GUARDIAN (Jan. 3, 2014), <http://www.theguardian.com/politics/2014/jan/03/legal-marijuana-colorado-big-tobacco-lobbying> [<http://perma.cc/URY2-TTBE>].

⁷ *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting) (emphasis added).

⁸ *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983); *accord* *Vermont v. New York*, 417 U.S. 270, 270–71 (1974); *Georgia v. Tenn. Copper Co. (Tennessee Copper I)*, 206 U.S. 230,

Recognizing this principle, Nebraska and Oklahoma have sought to invoke the Supreme Court's original jurisdiction to challenge Colorado's experiment.⁹ Their complaint contends that "Colorado has created a dangerous gap in the federal drug control system" enabling marijuana to "flow . . . into neighboring states, undermining [their] own marijuana bans, draining their treasuries, and placing stress on their criminal justice systems."¹⁰ Yet, rather than premising their claim on these *personal injuries*, they inexplicably chose to pin their suit on harms allegedly inflicted on the federal government.

Seeking to "enforce . . . the Supremacy Clause, Article VI of the U.S. Constitution,"¹¹ Nebraska and Oklahoma contend that Colorado's venture violates the federal Controlled Substances Act ("CSA"), which bans marijuana nationwide.¹² They charge that Colorado's decriminalization of marijuana "roguishly facilitate[s] the dismantling of [federal drug] policy,"¹³ "undermines express *federal* priorities in the area of drug control and enforcement," and "interferes with U.S. foreign relations and broader narcotic and psychotropic-drug-trafficking interdiction and security objectives" thereby harming "a wide range of U.S. interests."¹⁴ Asserting that they have been forced to rise to the federal government's defense "[b]ecause the current federal administration seems unwilling" to do so,¹⁵ they pray for an order enjoining Colorado's pot-friendly regime.¹⁶

Nebraska's and Oklahoma's federal-supremacy suit suffers from a myriad of fatal deficiencies—they lack standing to represent the federal government's interests,¹⁷ their complaint does not plead injury with the par-

238–39 (1907); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 564–65 (1851).

⁹ See Complaint at 1, *Nebraska v. Colorado*, 135 S. Ct. 2070 (filed Dec. 18, 2014) (No. 144 ORG), 2014 WL 7474136, at *1; Brief in Support of Motion for Leave to File Complaint at 2, *Nebraska*, 135 S. Ct. 2070 (No. 144 ORG) [hereinafter Opening Brief]; Reply Brief in Support of Motion for Leave to File Complaint at 3, *Nebraska*, 135 S. Ct. 2070 (No. 144 ORG) [hereinafter Reply Brief]. Nebraska's and Oklahoma's suit is currently in limbo. Supreme Court Rules dictate that the Court must grant states leave to file an original action. U.S. SUP. CT. R. 17. Last May, the Court deferred deciding whether it will hear the case, asking the U.S. Solicitor General to brief the issue. *Nebraska and Oklahoma v. Colorado Pending Petition*, SCOTUSBLOG (May 4, 2015), <http://www.scotusblog.com/case-files/cases/nebraska-and-oklahoma-v-colorado/> [<http://perma.cc/K5E9-TRME>].

¹⁰ Complaint, *supra* note 9, at 3–4.

¹¹ *Id.* at 1.

¹² 21 U.S.C. § 841 (2012).

¹³ Reply Brief, *supra* note 9, at 2 (emphasis added).

¹⁴ Complaint, *supra* note 9, at 21 (emphasis added).

¹⁵ Opening Brief, *supra* note 9, at 10.

¹⁶ Complaint, *supra* note 9, at 28–29; see *infra* notes 388–401 and accompanying text (explaining Nebraska's and Oklahoma's prayer for relief).

¹⁷ See *infra* notes 213–253 and accompanying text (exploring why Nebraska and Oklahoma lack standing to represent the federal government's interests).

ticularity required to invoke the Court's original jurisdiction,¹⁸ and their prayer for injunctive relief runs afoul of the Tenth Amendment's anti-commandeering proscriptions.¹⁹ Yet, at its core their complaint comes tantalizingly close to presenting a legitimate claim. A long-recognized body of law recognizes that the well-worn "laboratories of democracy" mantra does not insulate states from original actions sounding in *nuisance*.²⁰

Although states lack standing to represent federal interests in the supremacy of federal law, they may seek redress for transboundary nuisances committed by their neighbors. Accordingly, more than a century ago when Tennessee permitted copper smelters to release noxious gases into the atmosphere causing the "destruction of forests, orchards, and crops" in neighboring Georgia, Justice Brandeis's famous adage provided the Volunteer State no comfort.²¹

The decision in that 1907 case, *Georgia v. Tennessee Copper*, stands as a bulwark of the Supreme Court's *horizontal-federalism jurisprudence*—the body of law protecting state polities from incursions by sister states.²² The Court unanimously recognized that while ultimate judgment of whether a state's regulatory choices are "doing more harm than good to her citizens" is ordinarily reserved "for her to determine,"²³ the Constitution bars states from undertaking endeavors that conscript the citizens or property of their

¹⁸ See *infra* note 222 and accompanying text (noting that Nebraska's and Oklahoma's complaint does not satisfy the heightened pleading standards required to invoke the Supreme Court's original jurisdiction).

¹⁹ See *infra* notes 378–427 and accompanying text (asserting that the Constitution's anti-commandeering proscriptions deny the Court the power to compel Colorado to enact or enforce laws banning the possession or sale of marijuana).

²⁰ Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1501–03 (2009). We first proposed that a sister state could invoke the Supreme Court's original jurisdiction to challenge Colorado's regime under the federal common law of nuisance in a draft version of this Article that was distributed before Nebraska and Oklahoma filed suit. Therefore, this earlier draft did not discuss the merits of their federal-supremacy theory.

²¹ *Tennessee Copper I*, 206 U.S. at 236. The sulfuric acid fallout produced by the Tennessee smelting was so toxic that a huge swath of vegetation-less land remains at its epicenter to this day. Fred Pearce, *How Hellish Smoke Gave Tennessee a Poisoned Desert*, NEW SCIENTIST (June 7, 2011), <http://www.newscientist.com/article/mg21028156.600-how-hellish-smoke-gave-tennessee-a-poisoned-desert.html> [<http://perma.cc/HL8E-Z4T8>].

²² Although commentators have sacrificed untold forests addressing the issue of "vertical federalism"—the distribution of sovereign powers between the state and federal governments—comparably little ink has been spilled analyzing the equally important field of horizontal federalism. See Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 1019 (2011) (arguing that "a vibrant 'horizontal federalism' jurisprudence . . . comprises an equally important component to defending" the [s]tates' "residuary and inviolable" . . . sovereignty" as does the Supreme Court's "vertical federalism" case law (quoting *N. Ins. Co. v. Chatham County*, 547 U.S. 189, 194 (2006))).

²³ *Tennessee Copper I*, 206 U.S. at 239.

neighbors as guinea pigs in their experiments.²⁴ Thus, Tennessee's ability to embrace novel commercial endeavors was curbed by Georgia's right to be free from harmful externalities—"side effect[s] of . . . economic activity, [that] caus[e] [neighbors] . . . to suffer without compensation."²⁵

When it comes to transboundary externalities, the Constitution dictates that states are "not compelled to lower [themselves] to the more degrading standards of a neighbor."²⁶ This limitation on state power derives from the ancient maxim that embodies the law of nuisance—"sic utere tuo ut alienum non laedas, that is, so use your own as not to injure another's property."²⁷ It is also inherent in the commitment to a republican form of government.²⁸ Although Tennesseans are empowered to determine for themselves whether the benefits of risky in-state innovations outweigh their costs, Georgians are "deprived of the opportunity to exert political pressure" upon Tennessee's legislature "in order to obtain a change in policy."²⁹ Georgians are also denied any share in the revenue that might justify the costs of the

²⁴ See *id.* at 238–39.

²⁵ *Externality*, BLACK'S LAW DICTIONARY (10th ed. 2014). As one commentator observed:

The standard example of negative externalities is that of spillovers like air pollution that are emitted from a factory having harmful effects on the surrounding environment and population. While the factory benefits from the ability to produce its goods without paying for pollution reduction measures, the population bears the cost of the pollution: they may have health problems due to the pollution, the value of their property may decrease, and so forth.

Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 ARIZ. J. INT'L & COMP. LAW 515, 527 (1998) (citation omitted).

²⁶ *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 107 (1972).

²⁷ *Lussier v. San Lorenzo Valley Water Dist.*, 253 Cal. Rptr. 470, 473 (Ct. App. 1988); see *Elwood v. City of New York*, 450 F. Supp. 846, 867 (S.D.N.Y. 1978) (applying the maxim to the federal common law of nuisance), *rev'd*, 606 F.2d 358 (2d Cir. 1979); REBECCA M. BRATSPIES & RUSSELL A. MILLER, *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 3* (Rebecca M. Bratspies & Russell A. Miller eds., 2006) (identifying as one of the *Trail Smelter* principles the idea that "one should use one's own property so as not to injure another"); Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 953 (1997) ("In summing up the customary international law of transboundary pollution, contemporary publicists frequently say that it adopts the maxim *sic utere tuo ut alienum non laedas*"); accord *Tennessee Copper I*, 206 U.S. at 238–39; *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1965 (1938) (stating that "under the principles of international law, as well as of the law of the United States, no [s]tate has the right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another or the properties or persons therein").

²⁸ U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."); see DeVeaux, *supra* note 22, at 1035 (arguing that the Constitution divests states of the authority to regulate activities outside their borders because "each sovereign governs only with the consent of the governed" (quoting *Nevada v. Hall*, 440 U.S. 410, 426 (1979))).

²⁹ *Edwards v. California*, 314 U.S. 160, 174 (1941).

endeavor.³⁰ For these reasons, the Court declared the Tennessee smelting an interstate nuisance that violated the Constitution's federalist covenant and ordered its abatement.³¹

Tennessee Copper is just one of more than a dozen Supreme Court decisions standing in judgment of state experiments alleged to produce transboundary nuisances or deplete resources shared by multiple states.³² The Constitution expressly endows the Supreme Court with "original jurisdiction" over such "Controversies between two or more States."³³ This "state-

³⁰ A nuisance usually occurs where a landholder engages in acts that produce externalities that force neighbors to "share his burden"—the costs imposed by the acts—without receiving any "share [of the] profits." 3 WILLIAM BLACKSTONE, COMMENTARIES *219.

³¹ *Tennessee Copper I*, 206 U.S. at 238–39. The offending gases were emitted by two private companies, not agents of the state. *Georgia v. Tenn. Copper Co. (Tennessee Copper II)*, 237 U.S. 474, 475–76 (1915). Nonetheless, the facts warranted the invocation of original jurisdiction. The Supreme Court has consistently recognized that an aggrieved neighboring state may invoke state-controversy jurisdiction to abate nuisances committed by private actors acting with the knowledge and consent of their host state. *E.g.*, *Idaho v. Oregon*, 444 U.S. 380, 385 (1980) (permitting Idaho to file a complaint against Washington for allowing private fishermen to take inequitable shares of fish from the Columbia and Snake Rivers); *Vermont*, 417 U.S. at 270 (permitting Vermont to file a complaint against New York to abate the discharge of pollutants into Lake Champlain by a private New York corporation); *Wyoming v. Colorado*, 259 U.S. 419, 455–56 (1922) (permitting Wyoming to file a complaint against Colorado for allowing two private corporations to draw inequitable shares of water from the Laramie River).

³² *E.g.*, *Idaho*, 444 U.S. at 385 (alleging Oregon and Washington allowed fishermen to take disproportionate shares of fish from the Columbia and Snake Rivers); *Vermont*, 417 U.S. at 270 (accusing New York of polluting Lake Champlain); *Connecticut v. Massachusetts*, 282 U.S. 660, 662 (1931) (seeking to enjoin Massachusetts's diversion of water from the Connecticut River); *New Jersey v. City of New York (New Jersey II)*, 283 U.S. 473, 476–77 (1931) (seeking to enjoin off-shore garbage dumping by New York that caused trash to wash ashore on New Jersey beaches); *New Jersey v. New York (New Jersey I)*, 283 U.S. 336, 341–42 (1931) (alleging New York drew an inequitable amount of water from the Delaware River before it entered New Jersey); *Wisconsin v. Illinois*, 278 U.S. 367, 399 (1929) (challenging Illinois's diversion of water from Lake Michigan to the Mississippi River which substantially reduced water levels in the lower Great Lakes); *Wyoming*, 259 U.S. at 455 (alleging Colorado drew an inequitable amount of water from the Laramie River before it entered Wyoming); *North Dakota v. Minnesota*, 256 U.S. 220, 221 (1921) (alleging Minnesota redirected water into Lake Traverse, causing flooding in North Dakota); *New York v. New Jersey*, 249 U.S. 202, 202–03 (1919) (seeking to enjoin New Jersey's discharge of sewage into New York Harbor); *Tennessee Copper I*, 206 U.S. at 236–37 (alleging poisonous gas emanating from a Tennessee plant caused damage in Georgia); *Missouri v. Illinois (Missouri I)*, 180 U.S. 208, 208–09 (1901) (alleging Illinois's discharge of untreated sewage into the Mississippi River polluted drinking water in Missouri); *South Carolina v. Georgia*, 93 U.S. 4, 9 (1876) (challenging Georgia's obstruction of navigation on the Savannah River); *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 564–65 (alleging a low-hanging Virginia bridge over the Ohio River obstructed the passage of ships to ports in Pennsylvania).

³³ U.S. CONST. art. III, § 2. Congress has made the Court's jurisdiction over such cases "exclusive." 28 U.S.C. § 1251(a) (2012).

controversy jurisdiction”³⁴ serves “as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.”³⁵

The “cardinal rule, underlying all the relations of the states to each other, is that of equality of right”—each “stands on the same level with all the rest.”³⁶ Nonetheless, when “the action of one [s]tate reaches . . . into the territory of another . . . the question of the extent and the limitations of the rights of the two [s]tates becomes a matter of justiciable dispute between them.”³⁷ The Constitution entrusts the Supreme Court “to settle” these disputes “in such a way as will recognize the equal rights of both and at the same time establish justice between them.”³⁸

Supreme Court intervention is necessary because “[t]he states of this Union cannot make war upon each other They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties.”³⁹ The Constitution likewise prohibits states from conducting customs inspections of containers, vehicles, and persons entering their territory.⁴⁰

Federal common law provides the rule of decision in original actions for nuisance.⁴¹ “[T]he elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant.”⁴² Such claims “are founded on a theory of public nui-

³⁴ Robert D. Cheren, *Environmental Controversies “Between Two or More States,”* 31 PACE ENVTL. L. REV. 105, 106 (2014) (coining the term “state-controversy jurisdiction” to describe the Supreme Court’s original jurisdiction over controversies between two or more states).

³⁵ *North Dakota v. Minnesota (North Dakota II)*, 263 U.S. 365, 372–73 (1923).

³⁶ *Kansas II*, 206 U.S. at 97.

³⁷ *Id.* at 97–98.

³⁸ *Id.* at 98.

³⁹ *Kansas v. Colorado (Kansas I)*, 185 U.S. 125, 143 (1902).

⁴⁰ *Torres v. Puerto Rico*, 442 U.S. 465, 472–73 (1979). In *Torres v. Puerto Rico* in 1979, the Court confronted a Puerto Rico statute that authorized customs inspections of persons and articles arriving from the U.S. mainland. *Id.* at 466. The statute was intended to curb “the importation of firearms, explosives, and narcotics from the mainland.” *Id.* at 466–67. Puerto Rico asserted that because it is not a state, and because as an island “its borders . . . are in fact international borders with respect to all countries except the United States,” it was not subject to the restrictions that a state would be. *Id.* at 471–72. The Court rejected both contentions. First, it concluded that the Commonwealth of Puerto Rico is subject to the same Fourth Amendment restrictions as the states. *Id.* Second, the Court held that “Puerto Rico is not unique because it is an island” as “neither Alaska nor Hawaii are contiguous to the continental body of the United States.” *Id.* at 474. Thus, Colorado’s neighbors are subject to the very same restrictions recognized by *Torres*.

⁴¹ *E.g., Milwaukee I*, 406 U.S. at 103–04; *Missouri I*, 180 U.S. at 241–42; RICHARD H. FALLON, JR., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 287 (5th ed. 2003) [hereinafter *FEDERAL COURTS*].

⁴² *Michigan v. U.S. Army Corps of Eng’rs*, 667 F.3d 765, 781 (7th Cir. 2011) (quoting *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979), *vacated*, *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981)); *accord* *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2536 (2011) (identifying cases where the Court permitted states to sue to challenge activity

sance” and essentially mirror the common law of public nuisance familiar to property attorneys around the country.⁴³

Historically, the bulk of the transboundary nuisance actions heard by the Court involved pollution.⁴⁴ Congress’s expansion of the Clean Air and Water Acts in the 1970s, which established uniform national air and water-quality standards and invested the Environmental Protection Agency (“EPA”) with jurisdiction to administer them, put an end to virtually all such cases.⁴⁵ Consequently, generations of attorneys and Justices have matriculated without any experience with this once-common species of Supreme Court litigation.⁴⁶ Colorado’s embrace of the recreational marijuana industry has created a new form of transboundary pollution, reawakening this long-dormant field of constitutional law from its slumber.

Unlike other state vice-legalization experiments such as gambling,⁴⁷ prostitution,⁴⁸ and prize-fighting⁴⁹—which involve *actions* undertaken at a

harmful to their citizens’ health and welfare); *Tennessee Copper I*, 206 U.S. at 238–39 (asserting the presence of a nuisance when “sulphurous fumes caus[ed] and threaten[ed] damage on so considerable a scale to the forests and vegetable life . . . as to make out a case within the requirements [of nuisance]”); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012) (“Under federal common law, a public nuisance is defined as an ‘unreasonable interference with a right common to the general public.’” (quoting RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979))).

⁴³ *Kivalina*, 696 F.3d at 855; accord, e.g., *U.S. Army Corps of Eng’rs*, 667 F.3d at 780–81 (adopting the definition of public nuisance found in the *Restatement (Second) of Torts* to address interstate harms); *Nat’l Sea Clammers Ass’n v. City of New York*, 616 F.2d 1222, 1235 (3d Cir. 1980) (“Thus, these plaintiffs, who have a right under federal common law to abate the pollution of interstate waters, have also suffered sufficient individual harm to sue for damages arising from that public nuisance.”), *vacated on other grounds sub nom.* *Middlesex Cty. Sewage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981).

⁴⁴ E.g., *Vermont*, 417 U.S. at 270 (accusing New York of polluting Lake Champlain); *New Jersey II*, 283 U.S. at 476–77 (seeking to enjoin off-shore garbage dumping by New York that caused trash to wash ashore on New Jersey beaches); *New York*, 249 U.S. at 202–03 (seeking to enjoin New Jersey’s discharge of sewage into New York Harbor); *Tennessee Copper I*, 206 U.S. at 230 (alleging that poisonous gas emanating from a Tennessee plant caused damage in Georgia); *Missouri I*, 180 U.S. at 241–42 (alleging Illinois’s discharge of untreated sewage into the Mississippi River polluted drinking water in Missouri). *But see South Carolina*, 93 U.S. at 9 (alleging that Georgia’s obstruction of navigation on the Savannah River constituted a nuisance); *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.), at 564–65 (holding that a low-hanging Virginia bridge over the Ohio River that obstructed passage of ships to ports in Pennsylvania constituted a nuisance).

⁴⁵ See *Am. Elec. Power Co.*, 131 S. Ct. at 2532 (holding that the Clean Air Act preempts federal common law of nuisance with regard to interstate air pollution); *Milwaukee II*, 451 U.S. at 314 (holding that 1972 Amendment to the Clean Water Act preempts federal common law of nuisance with regard to the pollution of interstate bodies of water).

⁴⁶ See Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 717 (2004) (asserting that “the federal common law of interstate nuisance” met “its ultimate demise following the enactment of the Clean Water Act”).

⁴⁷ Although many states have loosened restrictions on gambling in recent years, Nevada remains the only state where wide-open “gaming” is completely legal and exists in virtually every corner of its territory. See Jamisen Etzel, *The House of Cards Is Falling: Why States Should Co-*

fixed location—Colorado’s initiative authorizes the trafficking of *goods*⁵⁰ that can easily cross state lines inside luggage,⁵¹ through the mail,⁵² or in the trunks of cars.⁵³ In this way, marijuana legalization produces regional externalities that closely resemble pollution. Just as contaminants released into rivers flow across state lines,⁵⁴ marijuana introduced into the stream of commerce from Colorado dispensaries will predictably flow into neighboring states through the simple expediency of placing lawfully purchased cannabis in vehicles which are then driven across state lines. And just as the

operate on Legal Gambling, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 199, 231 (2012) (describing Nevada as the nation’s “most liberal licensor,” with over three hundred separately licensed gaming locations). During the early twentieth century, the State coupled this vice with another unconventional law to attract revenues. As one commentator noted, “Nevada became the leading divorce destination in the early years of the Depression when it cut its residency requirement to six weeks and legalized wide-open gambling to entertain new residents waiting for their divorces.” Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 384 (2007).

⁴⁸ Nevada permits prostitution in licensed brothels. NEV. REV. STAT. ANN. § 201.354 (West 2015).

⁴⁹ As one commentator noted:

[The lack of a central body governing the issuance of boxing licenses] gives state boxing commissions an incentive to promulgate and enforce lax regulations that bring boxing business into their states. In turn, boxers and promoters are encouraged to “forum shop” among the various state commissions in order to obtain licenses or to perpetuate unfair business practices with a minimum of oversight or interference. According to Senator John McCain . . . “[t]his vacuum of state regulation invite[s] forum shopping by unscrupulous promoters and managers and also provide[s] a fertile breeding ground for fixed bouts, the exploitation of boxers, and a lack of adequate medical services at many events.

Brad Ehrlichman, *In This Corner: An Analysis of Federal Boxing Legislation*, 34 COLUM. J.L. & ARTS 421, 437 (2011) (latter alternations in original) (footnotes omitted).

⁵⁰ See U.C.C. § 2-105 (AM. LAW INST. & UNIF. LAW COMM’N 2002) (defining goods as “all things . . . which are moveable at the time of identification to the contract for sale”).

⁵¹ Associated Press, *Washington, Colorado Have Few Ways to Stop Carry-On Weed*, N.Y. POST (Jan. 30, 2014), <http://nypost.com/2014/01/30/washington-colorado-have-few-ways-to-stop-carry-on-weed/> [<http://perma.cc/WC5A-EFYL>] (noting that “[i]t can be easier to get through airport security with a bag of weed than a bottle of water”).

⁵² In 2012, before Colorado legalized recreational marijuana use, the Post Office reported a substantial uptick in intercepted marijuana packages emanating from the state, likely a result of Colorado’s liberal medicinal marijuana statute. John Ingold, *Colorado Post Offices See Increase in Marijuana Packages*, DENVER POST (Feb. 28, 2012), http://www.denverpost.com/ci_20058373 [<http://perma.cc/UH2K-6J6K>].

⁵³ Jenny Deam, *Colorado’s Neighbors Dismayed by New Wave of Marijuana Traffic*, L.A. TIMES (May 27, 2014), <http://www.latimes.com/nation/la-na-pot-trafficking-20140527-story.html#page=1> [<http://perma.cc/R85V-Z2JY>] (noting a sharp rise in marijuana trafficking in Nebraska counties bordering Colorado).

⁵⁴ See *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069–70 (9th Cir. 2006) (upholding imposition of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) on a Canadian copper smelter that discharged “hazardous substances” into a Canadian stretch of the Columbia River that were “carried downstream in the passing river current and settled in slower flowing quiescent areas” in the United States).

laws of gravity and hydrology guide interstate watercourses, greed drives the movement of Colorado pot. Marijuana is the most lucrative cash crop in the United States.⁵⁵ The resulting “high demand in the interstate market will draw” Colorado weed “into that market” thereby having a “substantial effect on the supply and demand” of the drug in the black markets of neighboring states.⁵⁶ Significant evidence demonstrates that large quantities of Colorado cannabis are now being diverted into these markets.⁵⁷ The Court should employ the same principles it once applied in cases involving interstate environmental nuisances to resolve this problem.

The burden faced by the Court in an action seeking relief for the spill-over effects of Colorado marijuana is less onerous than that presented by the environmental-nuisance cases of the past. The Court is not comprised of scientists and is ill-equipped to resolve controversies such as what concentration of a given pollutant in air or water is acceptable.⁵⁸ As such, in the days before the EPA, it was forced to rely on “often vague and indeterminate nuisance concepts and maxims of equity jurisprudence” to resolve such disputes.⁵⁹ But it is well settled that “when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual lawmaking by federal courts disappears.”⁶⁰ Congress has not delegated adjudication of interstate-nuisance actions involving marijuana to an administrative agency as it did with air and water-quality disputes.⁶¹ But it also has not left the question of whether the introduction of marijuana into interstate commerce constitutes a nuisance to the “vague and indeterminate . . . maxims of equity jurisprudence.”⁶² An activity constitutes

⁵⁵ Nitya Venkataraman, *Marijuana Called Top U.S. Cash Crop*, ABC NEWS (Dec. 18, 2006), <http://abcnews.go.com/Business/story?id=2735017> [<http://perma.cc/277A-GGPG>] (noting that marijuana is the most profitable cash crop in the United States).

⁵⁶ *Gonzales v. Raich*, 545 U.S. 1, 19 (2005) (Scalia, J., concurring).

⁵⁷ See *infra* notes 182–212 and accompanying text (noting a surge in seizures of Colorado cannabis in surrounding states).

⁵⁸ The Court recently explained Congress’s decision to endow the EPA with primary responsibility for regulating greenhouse gases:

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.

Am. Elec. Power Co., 131 S. Ct. at 2539–40.

⁵⁹ *Milwaukee II*, 451 U.S. at 317.

⁶⁰ *Id.* at 314.

⁶¹ See *infra* notes 286–333 and accompanying text (distinguishing air and water quality disputes from marijuana disputes because Congress has not delegated an agency to adjudicate marijuana disputes).

⁶² See *Milwaukee II*, 451 U.S. at 317.

a public nuisance when it creates “significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.”⁶³ Congress has determined that the “importation, manufacture, distribution, and possession” of marijuana has “a substantial and detrimental effect on the health and general welfare of the American people”⁶⁴ and that the intrastate “distribution and possession of [marijuana] contribute[s] to swelling the interstate traffic in such substances.”⁶⁵

Although Congress has settled the question of whether the introduction of marijuana into commerce constitutes a public nuisance,⁶⁶ it remains the Court’s duty to determine what remedy, if any, is available. In our view, issuance of injunctive relief of the sort sought by Nebraska and Oklahoma would violate the Constitution. Such an order would entail the judicial commandeering of Colorado’s legislature and law enforcement in violation of the Tenth Amendment.⁶⁷ Instead, we argue that the Court should award damages to prevailing sister states, compensating them for the injuries inflicted by the incursion of Colorado marijuana into their territory.

In making this contention, we draw inspiration from Nobel laureate Ronald Coase’s Theorem for Externalities.⁶⁸ The Coase Theorem⁶⁹ contends

⁶³ RESTATEMENT (SECOND) OF TORTS § 821B; *accord Am. Elec. Power Co.*, 131 S. Ct. at 2536 (defining federal common law nuisance as activities “harmful to . . . citizens’ health and welfare”).

⁶⁴ 21 U.S.C. § 801(2) (2012) (stating Congress’s findings and declarations on controlled substances which include marijuana). These findings rest on solid science. As a recent study published in the *New England Journal of Medicine* concluded, marijuana use causes “long-lasting changes in brain function that can jeopardize educational, professional and social achievements.” Nora D. Volkow et al., *Adverse Health Effects of Marijuana Use*, 370 NEW ENG. J. MED. 2219, 2225 (2014).

⁶⁵ 21 U.S.C. § 801(4).

⁶⁶ The Justice Department announced that it will not seek indictments of Colorado vendors that sell marijuana pursuant to Colorado law. Press Release, Dep’t of Justice, Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html> [<http://perma.cc/J3CV-R3R7>]. This in no way affects the legality of Colorado pot vendors’ conduct. As stated by the U.S. Bankruptcy Court for the District of Colorado,

[F]ederal prosecutors may well choose to exercise their prosecutorial discretion and decline to seek indictments under the CSA where the activity that is illegal on the federal level is legal under Colorado state law. Be that as it may, even if [marijuana vendors are] never charged or prosecuted under the CSA, . . . [u]nless and until Congress changes that law, . . . [their] activities constitute a continuing federal crime.

In re Rent-Rite Super Kegs West Ltd., 484 B.R. 799, 805 (Bankr. D. Colo. 2012).

⁶⁷ See *infra* notes 369–427 and accompanying text (asserting that the Constitution’s anti-commandeering proscriptions deny the Court the power to compel Colorado to enact or enforce laws banning the possession or sale of marijuana).

⁶⁸ In its original incarnation, the Coase Theorem was premised on two criteria. First, Coase asserted the law must clearly assign property rights—e.g., the right of neighbors to receive compensation from polluters for externalities. See Ronald H. Coase, *The Problem of Social Cost*, 3

that if transaction costs are eliminated, “parties will negotiate the efficient solution to . . . nuisance problem[s].”⁷⁰ This is so because in the absence of such costs, an enterprise that can exploit its property rights more efficiently than its neighbors will be able to contract with them to buy their interests,⁷¹ in effect, “shar[ing] . . . the profits associated with the nuisance . . . in exchange for allowing the nuisance to continue.”⁷²

Because transaction costs plague modern life,⁷³ real-world application of the Coase Theorem is only attained through the application of legal rules that best approximate the way disputes would be resolved in the absence of such costs.⁷⁴

J.L. & ECON. 1, 2 (1960) [hereinafter Coase, *Social Cost*]. Second, he contended that transaction costs need to be practically eliminated. *See id.* He postulated that in such an environment more profitable enterprises that are able to internalize the costs of their venture and earn profits sufficient to justify the harms they produce will be able to “buy out” their afflicted neighbors by providing them a share of the profits in exchange for allowing the nuisance to continue. *See id.*; Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL’Y 107, 114 n.31 (2011). Coase acknowledged that it is impossible to eliminate transaction costs. RONALD COASE, *THE FIRM, THE MARKET, AND THE LAW* 174 (1988). In later life, he clarified his theory, asserting that the goal of the law should be to focus on the first of the two criteria addressed in his early work—the establishment of “an appropriate system of property rights”—one driven by predictable rules forcing polluters to internalize the cost of externalities resulting from their enterprises. Ronald H. Coase, *The Institutional Structure of Production*, in NOBEL LECTURES IN ECONOMIC SCIENCE 11, 17 (Torsten Persson ed., 1997). Such rules enable the most economically efficient of competing landowners to prevail in property disputes. *Id.*

⁶⁹ The Coase Theorem is regarded as “one of the most influential works on the law.” M. Alexander Pearl, *Of “Texans” and “Custers”: Maximizing Welfare and Efficiency Through Informal Norms*, 19 ROGER WILLIAMS U. L. REV. 32, 33 (2014); accord *Coltman v. Comm’r*, 980 F.2d 1134, 1137 (7th Cir. 1992) (celebrating Coase’s “long-belated but much-deserved Nobel Prize”); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 669 (1979) (calling the Coase Theorem “the most significant legal-economic proposition to gain currency since the early utilitarians identified the maximization of individual satisfaction with consumer freedom from conscious state regulation”); Daniel S. Levy & David Friedman, *The Revenge of the Redwoods? Reconsidering Property Rights and the Economic Allocation of Natural Resources*, 61 U. CHI. L. REV. 493, 493 (1994) (noting that the Coase Theorem is “[o]ne of the most influential ideas in the field of law and economics”).

⁷⁰ Michael J. Meurer, *Fair Division*, 47 BUFF. L. REV. 937, 952 (1999).

⁷¹ See Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 GA. L. REV. 179, 226 n.205 (1991).

⁷² Dogan & Young, *supra* note 68, at 114 n.31.

⁷³ Coase identified at least two types of transaction costs: “the cost of discovering what the relevant [market] prices are,” and “the costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market.” COASE, *supra* note 68, at 38–39.

⁷⁴ Steven N. Bulloch, *Fraud Liability Under Agency Principles: A New Approach*, 27 WM. & MARY L. REV. 301, 307 n.29 (1986); Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 69 (1968) [hereinafter Calabresi, *Transaction Costs*].

In the present case, such an outcome is best effectuated by a rule “charg[ing] the nuisance with the damages it cause[s].”⁷⁵ If compelling a polluter to internalize the cost of the pollution drives the polluter out of business, then the enterprise was not the most economically efficient use of the property and the polluter’s interests should yield to that of its neighbors.⁷⁶ This is so because its prior success was premised upon the ability to force others to subsidize some of the costs of its business.⁷⁷ The polluter was a free-rider.⁷⁸ In contrast, if the polluter assumes responsibility for all the costs of its venture and still realizes a sufficient profit to stay in business, then its use of the land is most efficient, and the polluter’s neighbors should yield to its interest.⁷⁹

If Colorado’s venture generates sufficient revenue to compensate its neighbors for transboundary harm and remains profitable its enterprise will have proven efficient and it will prevail by “shar[ing] . . . the profits associated with the nuisance” with its neighbors “in exchange for allowing the nuisance to continue.”⁸⁰ Conversely, if internalizing the costs of extraterritorial damage results in a net loss, its neighbors’ interests will ultimately prevail. In either case, the viability of Colorado’s program will turn on whether the profits it generates exceed the harm it creates—exactly the metric that would govern in a transaction-cost-free environment.

From a policy standpoint, we do not express an opinion whether marijuana legalization (or prohibition) is objectively “good” or “bad.” We remain agnostic.⁸¹ We simply posit that along with the wealth it generates, Colorado’s experiment produces harmful externalities that transcend the state’s borders. A judgment forcing Colorado to compensate its neighbors for these injuries is consistent with the premise that maximum utility can be

⁷⁵ Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 534–35 (1961) [hereinafter Calabresi, *Some Thoughts on Risk Distribution*].

⁷⁶ *Id.* (asserting that if a party causing a nuisance can compensate those harmed by the nuisance and still stay in business then the market has indicated that the benefits of the nuisance justify its existence)

⁷⁷ J. Otto Grunow, Comment, *Wisconsin Recognizes the Power of the Sun: Prah v. Maretti and the Solar Access Act*, 1983 WIS. L. REV. 1263, 1285 n.131 (noting that “when the externality is harmful, the cost is simply passed on to others who, by absorbing the loss, subsidize that activity”).

⁷⁸ Lisa Schenck, *Climate Change Crisis—Struggling for Worldwide Collective Action*, 19 COLO. J. INT’L ENVTL. L. & POL’Y 319, 335 (2008) (“Free-riding occurs when some parties bear the costs of an action, while others, the free-riders, bear no burden, but still enjoy the benefits.”).

⁷⁹ See Calabresi, *Some Thoughts on Risk Distribution*, *supra* note 75, at 534–35.

⁸⁰ See Dogan & Young, *supra* note 68, at 114 n.31.

⁸¹ Although our arguments focus on the negative externalities associated with marijuana, we do not intend to vilify marijuana. Many legal goods and activities—like alcohol, firearms, and gambling—create negative externalities. Ordinarily each state, as a quasi-sovereign, can decide the legality of the vice in question. But when a majority of jurisdictions all ban a particular thing and dissenting states fail to contain it to their borders, the Constitution’s transboundary nuisance prohibition is implicated.

achieved by forcing “the damaging business to pay for all damage caused.”⁸²

This Article consists of three Parts. Part I explores the history and purposes underlying the Supreme Court’s state-controversy jurisdiction—particularly cases involving transboundary nuisances.⁸³ We contend that sister-state suits seeking relief for extraterritorial harm caused by Colorado’s experiment—like interstate environmental nuisances of the past—fall squarely within the jurisdiction conferred upon the Court by the Constitution. In making this argument, we distinguish our thesis from Nebraska’s and Oklahoma’s pending federal-supremacy suit. Because their suit seeks to vindicate distinctively *federal* interests, we contend that they lack standing to assert it.

Part II examines the federal common law of nuisance.⁸⁴ Congress has partially preempted the question presented here. Its finding that the commercial exploitation of marijuana has “a substantial and detrimental effect on the health and general welfare of the American people”⁸⁵ establishes that Colorado’s regime is an interstate nuisance per se.

Finally, Part III analyzes the remedies available to a state prevailing in such an action.⁸⁶ We assert that the anti-commandeering doctrine precludes injunctive relief of the sort sought by Nebraska and Colorado. Instead, we contend that the Court should award a prevailing state damages compensating it—as well as can be done by a monetary award—for the harm inflicted by Colorado’s experiment.

I. THE SUPREME COURT POSSESSES ORIGINAL JURISDICTION OVER NUISANCE SUITS SEEKING RELIEF FOR EXTRATERRITORIAL HARM CAUSED BY COLORADO’S MARIJUANA-LEGALIZATION EXPERIMENT

A. State-Controversy Jurisdiction

The Constitution endows the Supreme Court with original jurisdiction over suits between states “as a substitute for the diplomatic settlement of

⁸² See Coase, *Social Cost*, *supra* note 68, at 2.

⁸³ See *infra* notes 87–278 and accompanying text.

⁸⁴ See *infra* notes 279–368 and accompanying text.

⁸⁵ 21 U.S.C. § 801(2). As it would be impracticable for a nine-member panel to make factual findings, when the Court accepts jurisdiction over an original action, it appoints a special master to conduct the proceedings. JOSEPH F. ZIMMERMAN, *INTERSTATE DISPUTES: THE SUPREME COURT’S ORIGINAL JURISDICTION* 215 (2006). “[T]he special master performs a role similar to the one performed by the U.S. District Court.” *Id.* The master ultimately submits proposed findings of fact, conclusions of law, and a recommended decree, all of which are “subject to consideration, revision, or approval by the Court.” *Arizona v. California*, 373 U.S. 546, 551 (1963); accord Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court’s Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 654 (2002).

⁸⁶ See *infra* notes 369–494 and accompanying text.

controversies between sovereigns and a possible resort to force.”⁸⁷ The first Congress made the Court’s jurisdiction over such matters “exclusive”⁸⁸ and it remains so to this day⁸⁹—“as in its very nature it necessarily must be.”⁹⁰ This jurisdiction is limited “to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment.”⁹¹ “If the [C]onstitution ha[d] given to no department the power to settle” such quarrels, “the large and powerful states” would inevitably force the “weak ones” to “acquiesce and submit to [their] physical power.”⁹²

Recalling the “horrid picture of the dissensions and private wars” between states that plagued fifteenth-century Germany, Alexander Hamilton argued in *The Federalist* that it is “essential to the peace of the Union” to entrust “that tribunal . . . having no local attachments” to resolve the “bickerings and animosities” that will inevitably “spring up among the members of the Union.”⁹³ Hamilton’s fears were prescient. In 1922, Supreme Court intervention “narrowly averted” an “armed conflict[]” between Texas and Oklahoma over a boundary dispute.⁹⁴ Even as the Court heard the case, “the militia of Texas” were amassing “to support the orders of [the Texas] courts, and an effort was being made to have the militia of Oklahoma called for a like purpose.”⁹⁵

“[T]here is no definition or description, contained in the Constitution of the kind and nature of the controversies” encompassed by state-controversy jurisdiction.⁹⁶ Thus, in exercising such jurisdiction, the Court “look[s] not merely to” the Constitution’s “language,” but also to “its historical origin” and to prior opinions in which the “meaning and the scope” of original jurisdiction “have received deliberate consideration.”⁹⁷ Although “it would be objectionable, and, indeed, impossible, for the [C]ourt to anticipate by definition what controversies can and what cannot be brought within [its] original jurisdiction,”⁹⁸ historically, such cases generally fall into three categories: conflicts over boundary lines,⁹⁹ water rights disputes,¹⁰⁰

⁸⁷ *North Dakota II*, 263 U.S. at 372–73.

⁸⁸ *Kansas I*, 185 U.S. at 139 (“The original jurisdiction of this court over ‘controversies between two or more [s]tates’ was declared by the judiciary act of 1789 to be exclusive . . .”).

⁸⁹ 28 U.S.C. § 1251(a).

⁹⁰ *Kansas I*, 185 U.S. at 139.

⁹¹ *North Dakota II*, 263 U.S. at 372–73.

⁹² *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838).

⁹³ THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁹⁴ *Oklahoma v. Texas*, 258 U.S. 574, 580 (1922).

⁹⁵ *Id.*

⁹⁶ *Missouri I*, 180 U.S. at 219.

⁹⁷ *Id.*

⁹⁸ *Id.* at 241.

⁹⁹ *E.g.*, *New Jersey v. New York*, 526 U.S. 589 (1999) (settling a dispute regarding jurisdiction over Ellis Island); *Nebraska v. Iowa*, 145 U.S. 519 (1892) (concluding that a sudden shift in

and transboundary nuisances.¹⁰¹ This latter class of cases has proven the most vexing.¹⁰²

“When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done.”¹⁰³ Rather, the Constitution entrusts the Court to equitably resolve such feuds.¹⁰⁴ “The [s]tates, by entering the Union, did not sink to the position of private owners, subject to one system of private law.”¹⁰⁵

1. Examples of Original Nuisance Actions

States have invoked the Court’s original jurisdiction on more than a dozen occasions to thwart a neighbor’s alleged nuisance.¹⁰⁶ Although the

the Missouri River did not change the boundary between states); *Missouri v. Kentucky*, 78 U.S. 395 (1870) (settling ownership of a Mississippi River island); *Missouri v. Iowa*, 48 U.S. 660 (1849) (settling Missouri’s northern boundary with Iowa).

¹⁰⁰ *E.g.*, *New Jersey I*, 283 U.S. at 341–42 (alleging New York drew an inequitable amount of water from the Delaware River before it entered New Jersey); *Wisconsin*, 278 U.S. at 367 (challenging Illinois’s diversion of water from Lake Michigan to the Mississippi River which substantially reduced water levels in the lower Great Lakes); *Wyoming*, 259 U.S. at 455 (alleging Colorado drew an inequitable amount of water from the Laramie River before it entered Wyoming).

¹⁰¹ *E.g.*, *Vermont*, 417 U.S. at 270 (accusing New York of polluting Lake Champlain); *New Jersey II*, 283 U.S. at 476–77 (seeking to enjoin off-shore garbage dumping by New York City that caused trash to wash ashore on New Jersey beaches); *New York*, 249 U.S. at 202–03 (seeking to enjoin New Jersey’s discharge of sewage into New York Harbor); *Tennessee Copper I*, 206 U.S. at 230 (alleging poisonous gas emanating from a Tennessee plant caused damage in Georgia); *Missouri I*, 180 U.S. at 219 (alleging Illinois’s discharge of untreated sewage into the Mississippi River polluted drinking water in Missouri); *South Carolina*, 93 U.S. at 9 (challenging Georgia’s obstruction of navigation on the Savannah River); *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 564–65 (alleging that a low-hanging Virginia bridge obstructed navigation on the Ohio River).

¹⁰² “There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ . . . There is general agreement that it is incapable of any exact or comprehensive definition.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) [hereinafter PROSSER & KEETON].

¹⁰³ *Tennessee Copper I*, 206 U.S. at 237.

¹⁰⁴ *See Rhode Island*, 37 U.S. (12 Pet.) at 726 (“Bound hand and foot by the prohibitions of the [C]onstitution, a complaining state can neither [negotiate treaties], or fight with its adversary . . .”).

¹⁰⁵ *Tennessee Copper I*, 206 U.S. at 237–38. Original actions involving interstate nuisances are governed by federal common law. *E.g.*, *Milwaukee I*, 406 U.S. at 103–04; *Missouri I*, 180 U.S. at 241–42; FEDERAL COURTS, *supra* note 41, at 287. But the Court, “[s]itting, as it were, as an international, as well as a domestic, tribunal, [looks to] federal law, state law, and international law, as the exigencies of the particular case may demand,” in promulgating the common-law rules that govern such disputes. *Kansas I*, 185 U.S. at 146–47.

¹⁰⁶ *See supra* note 32 and accompanying text (identifying more than a dozen Supreme Court decisions standing in judgment of state experiments alleged to produce transboundary nuisances).

Court's original nuisance decisions are too numerous to chronicle in detail here, a few notable examples merit discussion.¹⁰⁷

In 1851, Pennsylvania became the first state to successfully invoke the Court's original jurisdiction to abate a sister state's nuisance, obtaining an order compelling the removal of a Virginia bridge over the Ohio River that prevented high-stacked steamships from reaching Pittsburgh's harbor.¹⁰⁸ The Court recognized that because the Ohio River is "a navigable stream" capable of carrying "commerce upon it . . . to other [s]tates," Virginia's authorization of a bridge that "obstruct[s] navigation . . . could afford no justification [for its construction]."¹⁰⁹

Four years later, the Court reversed itself, allowing the bridge to be rebuilt after Congress enacted statutes declaring it part of a federal post road, essential "for the passage of mails."¹¹⁰ The Court—confronting the first instance of congressional preemption of federal common law—concluded that its 1851 holding was no longer binding because "[i]t was in conflict with [subsequent] acts of [C]ongress, which [are] the paramount law."¹¹¹

In the early 1900s, Illinois found itself in the crosshairs of two nuisance suits involving the Illinois Waterway, a man-made watercourse connecting Lake Michigan with the Mississippi River.¹¹² In 1901, Missouri sued Illinois seeking to enjoin Chicago from releasing untreated sewage into the Mississippi through the waterway.¹¹³ The bill alleged that St. Louis had suffered a typhoid fever outbreak after Illinois began diverting waste to the Mississippi.¹¹⁴ The Court unanimously overruled Illinois's demurrer, concluding that Missouri's claims, if substantiated, "threatened" the "health and comfort" of all Missourians and thus constituted a nuisance under federal common law.¹¹⁵ Such cases fall squarely within the Constitution's grant

¹⁰⁷ For a near-complete list of the Supreme Court's original jurisdiction cases, see Cheren, *supra* note 34, at 200–25.

¹⁰⁸ See *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 564–65. The site of the bridge, Wheeling, is in present-day West Virginia. Robert W. Milburn, *Congress Attempts to Remove Federal Court Supervision Over State Prisons: Is 3626(b)(2) of the Prison Litigation Reform Act Constitutional?*, 6 TEMP. POL. & CIV. RTS. L. REV. 75, 83 n.62 (1997) (noting that although the Virginia borders encompassed Wheeling at the time of the decision, Wheeling is in present day West Virginia). The Court's decision predated West Virginia's formation. *Id.*

¹⁰⁹ *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 564–65.

¹¹⁰ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429 (1855).

¹¹¹ *Id.* at 430. The supremacy of Congress's judgment was supported by its power "To establish . . . post Roads." U.S. CONST. art. I, § 8, cl. 7.

¹¹² See U.S. ARMY CORPS OF ENG'RS, ROCK ISLAND DIST., HISTORIC AMERICAN ENGINEERING RECORD: ILLINOIS WATERWAY, available at <http://cdn.loc.gov/service/pnp/habshaer/il/il0900/il0920/sheet/00001v.jpg> [<http://perma.cc/WCL9-SSBP>] (presenting the history and specifications of the Illinois Waterway).

¹¹³ *Missouri I*, 180 U.S. at 248.

¹¹⁴ *Missouri v. Illinois (Missouri II)*, 200 U.S. 496, 522–23 (1906).

¹¹⁵ *Missouri I*, 180 U.S. at 241.

of state-controversy jurisdiction. “If Missouri were an independent and sovereign [s]tate . . . she could seek a remedy by negotiation, and, that failing, by force.”¹¹⁶ Since Missouri’s “diplomatic powers” were “surrendered to the general government,” the Constitution entrusted the Supreme Court “to provide a remedy.”¹¹⁷

After the case was tried, the Court ultimately denied relief because Illinois successfully invoked the unclean-hands doctrine—an affirmative defense dictating that a plaintiff will be denied equitable relief if it is proven that “he has engaged in the same conduct that he describes in his Complaint.”¹¹⁸ Illinois proved that Missouri allowed its own towns to discharge the very same pollutants into the river, albeit in smaller quantities.¹¹⁹ Noting that the offending Missouri discharges were “above the intake of St. Louis,” the Court averred that “[w]here, as here, the plaintiff . . . deliberately permits discharges similar to those of which it complains,” it cannot claim that the defendant’s acts were wrongful and “courts should not be curious to apportion the blame.”¹²⁰

The Illinois Waterway became the subject of litigation once again in 1929—this time through a challenge by the state’s northerly neighbors. In that case, Wisconsin and Minnesota, joined by Ohio and Pennsylvania, obtained an injunction compelling Illinois to reduce the amount of water diverted from Lake Michigan to the Mississippi River after water levels dropped precipitously in the lower Great Lakes and the St. Lawrence River.¹²¹

In 1931, New Jersey successfully invoked the Court’s powers, obtaining an injunction putting an end to New York’s long-standing practice of

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Pujals ex rel. El Rey de los Habanos, Inc. v. Garcia*, 777 F. Supp. 2d 1322, 1332 (S.D. Fla. 2011).

¹¹⁹ *Missouri II*, 200 U.S. at 522.

¹²⁰ *Id.*; see also Merrill, *supra* note 27, at 999 (noting that the Supreme Court’s decision in *Missouri v. Illinois* in 1906 “alludes twice to the equitable doctrine of unclean hands”).

¹²¹ *Wisconsin*, 278 U.S. at 400. Ironically, the Illinois Waterway—now under the stewardship of the U.S. Army Corps of Engineers—became the subject of a federal common law of nuisance action again in 2011 in the Seventh Circuit Court of Appeals in *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d at 765. This time, Michigan sued the Waterway’s federal custodians, alleging that the invasive Asian carp would “migrate through waterworks operated by the defendants from rivers connected to the Mississippi into Lake Michigan and on to the other Great Lakes.” *Id.* at 771. The court rejected the defendants’ contention that they could not be held to answer in a nuisance action because the carp “travel on their own.” *Id.* The court concluded that the defendants “bear responsibility for nuisance caused by their operation of a manmade waterway between the Great Lakes and Mississippi watersheds.” *Id.* The fact that “they are not themselves physically moving fishing from one body of water to the other does not mean that their normal operation” of the Waterway “cannot cause a nuisance.” *Id.*

dumping garbage offshore.¹²² The Court awarded relief because New Jersey proved that its beaches had become inundated with New York trash.¹²³

Original actions such as these once comprised a relatively common part of the Court's docket, "run[ning] like threads of gold"¹²⁴ through some 4100 pages of the U.S. Reports.¹²⁵ The number of these actions fell dramatically in the 1970s following Congress's expansion of the Clean Air and Water Acts. These statutes set uniform national air and water-quality standards and "provide a forum for the pursuit of such claims before [an] expert agenc[y]," the EPA,¹²⁶ rendering the Court's historic role of establishing and enforcing interstate environmental standards obsolete.¹²⁷ Because most transboundary nuisance actions stemmed from such disputes, contemporary lawyers and jurists have no experience with these once-common suits.¹²⁸

2. The Supreme Court's Transboundary Nuisance Jurisprudence Is Consistent with Customary International Law

In formulating principles to adjudicate transboundary nuisance cases, the Supreme Court serves a role analogous to the International Court of Justice. "Sitting, as it were, as an international, as well as a domestic, tribunal, [the Court looks to f]ederal law, state law, and international law, as the exigencies of the particular case may demand," in promulgating the rules that govern such disputes.¹²⁹ The most famous international transboundary nuisance suit ever litigated is the *Trail Smelter* case, a dispute between the United States and Canada adjudicated between 1938 and 1941.¹³⁰ The case

¹²² *New Jersey II*, 283 U.S. at 478–83.

¹²³ *Id.*

¹²⁴ JAMES BROWN SCOTT, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION, at vii (1919).

¹²⁵ Cheren, *supra* note 34, at 107 (noting original jurisdiction decisions comprise 4100 pages of the U.S. Reports).

¹²⁶ *Milwaukee II*, 451 U.S. at 326; *accord Am. Elec. Power Co.*, 131 S. Ct. at 2539. These opinions do not suggest that Congress has similarly preempted the Court's jurisdiction over an original nuisance action challenging Colorado's marijuana regime. Although Congress has classified marijuana as a nuisance, it has not assigned cross-border nuisance disputes involving the drug to an "expert agenc[y]." *Milwaukee II*, 451 U.S. at 326; *see infra* notes 286–333 and accompanying text (distinguishing marijuana disputes from air and water pollution disputes because Congress has not delegated marijuana disputes to an expert agency).

¹²⁷ *Am. Elec. Power Co.*, 131 S. Ct. at 2536; *Milwaukee II*, 451 U.S. at 314.

¹²⁸ *See Percival*, *supra* note 46, at 717 (asserting that "the federal common law of interstate nuisance" met "its ultimate demise following the enactment of the Clean Water Act").

¹²⁹ *Kansas I*, 185 U.S. at 146–47.

¹³⁰ *See Trail Smelter*, 3 R.I.A.A. at 1962; BRATSPIES & MILLER, *supra* note 27, at 3 (observing that *Trail Smelter* has assumed "almost mythological status"); Merrill, *supra* note 27, at 947 (calling *Trail Smelter* "[b]y far the most influential decision on transboundary pollution in international law" and noting that it "has assumed immense importance in the development of the customary international law on transboundary pollution"); Austen L. Parrish, *Trail Smelter Déjà Vu*:

involved a Canadian copper-smelting plant in Trail, British Columbia, about ten miles north of the U.S. border.¹³¹ Like the smelters condemned by *Tennessee Copper*, the plant emitted noxious gases that caused property damage in neighboring Washington.¹³² The respective governments agreed to submit the controversy to a specially appointed panel of arbitrators.¹³³ Today, the panel's work is regarded as "a landmark decision" in transboundary nuisance law¹³⁴ and enjoys "almost mythological status" in the field.¹³⁵

Noting that no international tribunal had ever tackled such a dispute, the panel turned to the Supreme Court's state-controversy opinions, concluding that "the law followed in the United States in dealing with the quasi-sovereign rights of the [s]tates of the Union . . . is in conformity with the general rules of international law."¹³⁶ Applying *Tennessee Copper* and *Missouri v. Illinois*, the panel concluded that,

[U]nder the principles of international law as well as of the law of the United States, no [s]tate has the right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another or the properties or persons therein¹³⁷

The panel concluded that both customary international law and the U.S. Constitution dictate that a "[s]tate owes at all times a duty to protect other [s]tates against injurious acts by individuals from within its jurisdiction."¹³⁸ And when a state fails to fulfill this obligation, it must "pay compensation for the transboundary harm it has caused."¹³⁹ Concluding that the Canadian smelter had caused significant cross-border damage, the panel awarded damages to the United States.¹⁴⁰

Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes, 85 B.U. L. REV. 363, 364–65 (2005) (calling *Trail Smelter* "a landmark decision in international environmental law" and "the most famous international environmental law dispute"); Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL. L.J. 233, 236 (2006) (noting that the *Trail Smelter* arbitration is "one of the foundations of international law").

¹³¹ Robinson-Dorn, *supra* note 130, at 243 (providing factual background about the *Trail Smelter* arbitration).

¹³² *Id.*

¹³³ *Id.* at 249.

¹³⁴ Parrish, *supra* note 130, at 364.

¹³⁵ BRATSPIES & MILLER, *supra* note 27, at 3.

¹³⁶ *Trail Smelter*, 3 R.I.A.A. at 1963; see Merrill, *supra* note 27, at 938 ("[T]here is a fairly high degree of consensus under . . . international customary law . . . [that] a source state is legally responsible for transboundary pollution emanating from sources within its jurisdiction . . .").

¹³⁷ *Trail Smelter*, 3 R.I.A.A. at 1964–65 (citing *Missouri II*, 200 U.S. at 521, and *Tennessee Copper I*, 206 U.S. at 230).

¹³⁸ *Id.* at 1963.

¹³⁹ BRATSPIES & MILLER, *supra* note 27, at 3.

¹⁴⁰ *Trail Smelter*, 3 R.I.A.A. at 1907, 1965.

The U.S. Supreme Court continues to adhere to the *Trail Smelter* principles.¹⁴¹ In 1983, the Court concluded that Idaho had stated a prima facie cause of action against Oregon and Washington for failing to prevent private fishermen within their respective jurisdictions from “tak[ing] a disproportionate share of [Columbia and Snake River] fish destined for Idaho.”¹⁴² Under the Constitution, the Court said, “[s]tates have an *affirmative duty* . . . to take reasonable steps to conserve . . . the natural resources within their borders for the benefit of other [s]tates.”¹⁴³

3. Colorado’s Introduction of Marijuana into Interstate Commerce Satisfies the Requirements for an Original Nuisance Action

Like downstream pollution produced by industrial operations, the transboundary externalities resulting from Colorado’s introduction of marijuana into the stream of interstate commerce fall squarely within the ambit of the Court’s original jurisdiction. The exercise of this jurisdiction is most appropriately applied “to questions in which the sovereign and political powers of the respective states [are] in controversy”¹⁴⁴—and in particular, those involving a quarrel for which a “sovereign [s]tate . . . could seek a remedy by negotiation, and, that failing, by force.”¹⁴⁵ The present controversy presents just such a case. It strikes at the heart of the competing “sovereign and political powers of the respective states.”¹⁴⁶ And as independent nations, Colorado’s sister states would possess the full panoply of diplomatic measures to limit the flow of marijuana into their territory.

Most importantly, neighboring states could step up customs enforcement by closely inspecting individuals, motor vehicles and vessels entering their domain. It is well settled that sovereign nations possess the unfettered authority “to protect [themselves] by stopping and examining persons and property crossing into [their] country.”¹⁴⁷ Thus, searches conducted by fed-

¹⁴¹ See, e.g., *Evans*, 462 U.S. at 1024–25 (recognizing that Oregon and Washington are obligated to regulate private fishermen so as to prevent them from taking an inequitable share because “[s]tates have an *affirmative duty* . . . to take reasonable steps to conserve . . . the natural resources within their borders for the benefit of other [s]tates” (emphasis added)); *Vermont*, 417 U.S. at 270–71 (finding New York had a constitutional obligation to prevent a privately owned paper mill from polluting an interstate waterway); *Tennessee Copper I*, 206 U.S. at 238–39 (finding Tennessee had a constitutional obligation to prevent a private copper-smelting business from polluting the air of a neighboring state); *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 564–65 (finding Virginia had a constitutional obligation to prevent a company operating a private toll bridge over the Ohio River from obstructing navigation).

¹⁴² *Idaho*, 444 U.S. at 385.

¹⁴³ *Evans*, 462 U.S. at 1025 (emphasis added).

¹⁴⁴ *Missouri I*, 180 U.S. at 226.

¹⁴⁵ *Id.* at 241.

¹⁴⁶ *Id.* at 226.

¹⁴⁷ *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

eral customs officials at the U.S. border are “not subject to the warrant provisions of the Fourth Amendment and [are] ‘reasonable’ within the meaning of that Amendment.”¹⁴⁸

But upon joining the Union, Colorado’s neighbors gave up these powers. The Constitution divests states of the power to conduct customs searches.¹⁴⁹ Such inspections both violate the Fourth Amendment and run afoul of the states’ obligation to accord visitors “the privileges and immunities of [their] own residents.”¹⁵⁰ As such, states “ha[ve] no sovereign authority to prohibit entry into [their] territory” and “border and customs control” for all “ports of entry” must be exclusively “conducted by federal officers.”¹⁵¹

Absent exigent circumstances, baggage cannot be searched without a warrant.¹⁵² And the Supreme Court has recognized that vehicle searches conducted by state law-enforcement officers violate the Fourth Amendment “unless supported by . . . probable cause.”¹⁵³ Thus, so long as they abstain from conduct providing police probable cause to search their vehicles,¹⁵⁴ nothing prevents citizens of states where marijuana is illegal from driving to Colorado, filling their trunks with lawfully purchased pot and returning to their home states with their illicit bounty.¹⁵⁵

Airports likewise are ill-equipped to detect marijuana inside luggage. U.S. airports lack the capability to meaningfully screen passengers for can-

¹⁴⁸ *Id.* at 617.

¹⁴⁹ *Torres*, 442 U.S. at 472–73; see *supra* note 40 and accompanying text (noting that the Constitution prohibits states from conducting customs inspections of containers, vehicles, and persons entering their territory).

¹⁵⁰ *Torres*, 442 U.S. at 473; see U.S. CONST. art. IV, § 2, cl. 1.

¹⁵¹ *Torres*, 442 U.S. at 473. Because individuals smuggling marijuana out of Alaska by car would have to pass through customs in order divert it to another state, we believe that Alaska (or Hawaii if it chose to follow suit) is largely immune from the arguments we present in this Article.

¹⁵² *Id.* at 471. The Court has held that baggage within automobiles is subject to the “automobile exception” and can be searched without a warrant if supported by probable cause. *Wyoming v. Houghton*, 526 U.S. 295, 301 (1999).

¹⁵³ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 668 (1995) (O’Connor, J., dissenting).

¹⁵⁴ *But see Whren v. United States*, 517 U.S. 806, 814–16 (1996) (holding that the Fourth Amendment does not prevent police from pretextually stopping motorists who commit minor infractions).

¹⁵⁵ Colorado law permits marijuana vendors to sell their wares to Coloradans one ounce at a time, but limits sales to out-of-state residents to one quarter ounce at a time. COLO. REV. STAT. § 12-43.4-402(3)(a) (2014). Although this provision limits the amount of cannabis non-Coloradans can buy at any one store, the statute does nothing to prevent visitors (or Colorado residents) from “smurfing”—going from store to store to accumulate large amounts of pot to sell into the out-of-state black market. Editorial, *Maryland Should Slow Down on Pot Legalization*, WASH. POST (Jan. 13, 2014), https://www.washingtonpost.com/opinions/maryland-should-slow-down-on-pot-legalization/2014/01/12/bf218e5c-798a-11e3-af7f-13bf0e9965f6_story.html [http://perma.cc/XGM8-XPKE]. In addition, one commentator has argued that by distinguishing between Coloradans and residents of other states, Colorado may have violated the dormant Commerce Clause. Brannon P. Denning, *One Toke Over the (State) Line: Constitutional Limits on “Pot Tourism” Restrictions*, 66 FLA. L. REV. 2279, 2291 (2014).

nabis.¹⁵⁶ As the Associated Press reported, “[i]t can be easier to get through airport security with a bag of weed than a bottle of water.”¹⁵⁷

Once outside Colorado, this marijuana is easily diverted into the black markets of neighboring states. As Justice Scalia observed, rejecting arguments that the federal-marijuana ban unconstitutionally intrudes upon state sovereignty,¹⁵⁸ when a state permits marijuana to be introduced into its intrastate market, that marijuana “is never more than an instant from the interstate market—and this is so whether or not the possession is . . . lawful . . . under the laws of a particular [s]tate.”¹⁵⁹

Admittedly, Colorado’s diversion of marijuana into interstate commerce differs from conventional pollution because it involves criminal acts carried out by third parties—purchasers who take marijuana across state lines. Colorado argues that this renders the Court’s transboundary nuisance precedents inapplicable. After all, it asserts, “[w]hen a person purchases marijuana in Colorado and transports it across state lines, that person is violating . . . federal law and the laws of [other s]tates.”¹⁶⁰ One scholar echoed these sentiments, asserting that subjecting Colorado to nuisance liability rests on the “astounding argument” that states owe their neighbors an “affirmative obligation” to prevent their citizens from causing transboundary harm.¹⁶¹ But the Supreme Court’s interstate-nuisance decisions recognize just such an obligation. They hold that the Constitution imposes “an affirmative duty” on every state to protect its neighbors from harm emanating from its territory.¹⁶² This includes “a duty to protect other [s]tates against injurious acts by *individuals* from within its jurisdiction.”¹⁶³

¹⁵⁶ See Associated Press, *supra* note 51.

¹⁵⁷ *Id.*

¹⁵⁸ *Raich*, 545 U.S. at 41 (Scalia, J., concurring) (observing that federal preemption of state laws permitting marijuana use present no “violation of state sovereignty of the sort that would render this regulation ‘inappropriate’” (citation omitted)).

¹⁵⁹ *Id.* at 40. This is a function of economics. As one commentator noted, “drug prices reflect risk premiums charged at each stage of the manufacturing and distribution process: drug traffickers demand greater compensation to offset the risks of apprehension and incarceration.” Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 868 (2004). But when a state decriminalizes a drug the risk premium disappears and prices fall. *Id.* This will “become quite attractive to users in nearby get-tough states” because the drug may “be easily purchased in [the drug decriminalization] state and carried back home across our open interstate borders.” *Id.* Thus, opening a commercial drug market in one state will “make drugs cheaper and more readily available to the residents of other states, thus undermining the ability of get-tough states to achieve their preferences to be drug-free.” *Id.*

¹⁶⁰ Colorado’s Brief in Opposition to Motion for Leave to File Complaint at 19, *Nebraska*, 135 S. Ct. 2070 (No. 144 ORG) [hereinafter Opposition Brief].

¹⁶¹ Jonathan H. Adler, *Are Nebraska and Oklahoma Just Fair-Weather Federalists?*, VOLOKH CONSPIRACY (Dec. 19, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/19/are-nebraska-and-oklahoma-just-fair-weather-federalists/> [http://perma.cc/8L2H-M9TW].

¹⁶² *Evans*, 462 U.S. at 1025 (emphasis added); *accord Vermont*, 417 U.S. at 270–71 (holding New York had a constitutional obligation to prevent a privately owned paper mill from polluting

This principle is consistent with the common law of public nuisance. It is well settled that “[t]he law reasonably imposes a duty on a possessor of land to ensure that activities on that land—where the possessor has control—do not produce a nuisance.”¹⁶⁴ Consequently, a defendant is liable for criminal acts committed by third parties that emanate from his or her territory if the defendant “had reasonable anticipation of harm and failed to exercise reasonable care to avert such harm.”¹⁶⁵ One “cannot knowingly allow his [or her] property to become a haven for criminals to the detriment of . . . neighbors and deny that [the] property has become a nuisance because the resulting criminal activities are those of third parties.”¹⁶⁶ As explained in greater detail below, Colorado both is on notice that its marijuana market is harming sister states and has failed to exercise reasonable care to avert that

an interstate waterway); *Tennessee Copper I*, 206 U.S. at 238–39 (holding Tennessee had a constitutional obligation to prevent a private copper-smelting business from polluting the air of a neighboring state); *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 564–65 (holding Virginia had a constitutional obligation to prevent a company operating a private toll bridge over the Ohio River from obstructing navigation).

¹⁶³ *Trail Smelter*, 3 R.I.A.A. at 1963 (quoting CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 80 (1928)) (emphasis added); *accord Vermont*, 417 U.S. at 270–71 (holding New York had a constitutional obligation to prevent a privately owned paper mill from polluting an interstate waterway); *Tennessee Copper I*, 206 U.S. at 238–39 (holding Tennessee had constitutional obligation to prevent a private copper-smelting business from polluting the air of a neighboring state); *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 564–65 (holding Virginia had a constitutional obligation to prevent a company operating a private toll bridge over the Ohio River from obstructing navigation).

¹⁶⁴ *Redevelopment Agency of Stockton v. BNSF Ry.*, 643 F.3d 668, 676 (9th Cir. 2011).

¹⁶⁵ *Kelly v. Boys’ Club of St. Louis, Inc.*, 588 S.W.2d 254, 257 (Mo. Ct. App. 1979); *accord* RESTATEMENT (SECOND) OF TORTS § 838.

¹⁶⁶ *Kelly*, 588 S.W.2d at 257; *accord Redevelopment Agency*, 643 F.3d at 676 (noting that “[t]he law reasonably imposes a duty on a possessor of land to ensure that activities on that land—where the possessor has control—do not produce a nuisance”); *Lew v. Superior Court*, 25 Cal. Rptr. 2d 42, 45 (Ct. App. 1993) (considering irrelevant whether a nuisance was caused by the actions of third parties when considering whether a property constitutes a nuisance); *Statler v. Catalano*, 521 N.E. 2d 565, 573 (Ill. App. Ct. 1988) (holding that a defendant was liable for the actions of another when the defendant knew of the activity and failed to exercise reasonable care to prevent it); *Eaton v. Cormier*, 748 A.2d 1006, 1008 (Me. 2000) (noting that a landowner is liable for a nuisance created by the activity of a third party if the landowner knows of the risk that the activity will cause a nuisance yet still consents or fails to take reasonable care to prevent that activity); *Sholberg v. Truman*, 852 N.W.2d 89, 93–94 (Mich. 2014) (asserting that “control and possession are the determinative factors in the imposition of liability [for nuisance]”); *State v. Charpentier*, 489 A.2d 594, 598 (N.H. 1985) (holding that a property owner was liable for the dumping of waste onto her property by a third party because she had knowledge of the dumping and consented to it); *Mark v. State ex rel. Dep’t of Fish & Wildlife*, 84 P.3d 155, 161 (Or. Ct. App. 2004) (explaining that owners of land may be liable for the acts of third parties that cause a nuisance if the owners know of the risk of nuisance and consent to or fail to prevent the activity); *City of Seattle v. McCoy*, 4 P.3d 159, 169 (Wash. Ct. App. 2000) (adopting the *Restatement (Second) of Torts* standard of liability for a possessor who fails to take reasonable care to prevent nuisance by the activity of another); RESTATEMENT (SECOND) OF TORTS § 383.

harm.¹⁶⁷ Addressing Colorado's toothless warnings to marijuana purchasers that it is unlawful to take pot out of the state, the *Los Angeles Times* bluntly noted (no pun intended): "[I]t's fantasy to think that won't happen."¹⁶⁸

A 2011 opinion from the U.S. Court of Appeals for the Seventh Circuit, *Michigan v. U.S. Army Corp of Engineers*—fittingly directed at the Illinois Waterway, the man-made watercourse connecting the Great Lakes with the Mississippi River that was the target of two prominent original actions in the early twentieth century¹⁶⁹—illustrates this principle. There, the court rejected arguments by the Army Corps of Engineers, the watercourse's modern-day custodian,¹⁷⁰ that the Corps is immune from liability for the threatened migration of an invasive species of carp into the Great Lakes through the waterway.¹⁷¹ The Corps asserted it cannot be held to answer in a federal common law of nuisance action because the carp "travel on their own."¹⁷² The court concluded that the Corps "bear[s] responsibility for nuisance caused by [its] operation of a manmade waterway between the Great Lakes and Mississippi watersheds."¹⁷³ The fact that the Corps is "not . . . physically moving fish from one body of water to the other does not mean that [its] normal operation" of the waterway "cannot cause a nuisance."¹⁷⁴ Likewise, the fact that Colorado is not "physically moving" marijuana over its borders "does not mean that" its "normal operation" of its commercial pot market—which employs no meaningful safeguards to prevent spillover into other jurisdictions—"cannot cause a nuisance" in neighboring states.¹⁷⁵

Scholars Erwin Chemerinsky, Jolene Forman, Allen Hopper, and Sam Kamin recently co-authored an article arguing that Colorado and other marijuana-friendly states should be permitted to continue their experiments so long as their "regulatory regimes effectively prevent [certain] harms"¹⁷⁶—namely "the diversion of marijuana from states where it is legal under state law . . . to other states" and "drugged driving and the exacerbation of other

¹⁶⁷ See *infra* notes 182–212 and accompanying text (examining the diversion of Colorado marijuana to surrounding states and the corresponding failure of Colorado to take actions to prevent this diversion).

¹⁶⁸ Deam, *supra* note 53.

¹⁶⁹ See *supra* notes 112–121 and accompanying text (detailing two nuisance suits involving the Illinois Waterway, a manmade watercourse connecting Lake Michigan and the Mississippi River).

¹⁷⁰ See *Jenco v. United States*, No. 89 C 8897, 1991 WL 204964, at *1 (N.D. Ill. Oct. 1, 1991) (noting that the Army Corps of Engineers now exercises jurisdiction over the Illinois Waterway).

¹⁷¹ *Army Corps of Eng'rs*, 667 F.3d at 771. The plaintiffs could not invoke the Court's original jurisdiction because the defendant was a federal agency, not a state. See *id.* at 773.

¹⁷² *Id.* at 771.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Chemerinsky et al., *supra* note 4, at 78.

adverse public health consequences associated with marijuana use.”¹⁷⁷ Professor William Baude likewise argues that “[i]f a state legalizes and regulates a drug in a way that minimizes the risk of spillovers into the interstate black market, the federal drug laws should be forbidden to apply within that state.”¹⁷⁸

We agree.¹⁷⁹ States may quarrel over the propriety of legalized gambling,¹⁸⁰ but so long as Nevada’s casinos remain in its territory, its neighbors have no say in the matter. But Colorado has manifestly failed to prevent marijuana purchased in its wide-open pot marketplace from spilling into the black markets of neighboring states. And neither Dean Chemerinsky and his colleagues nor Professor Baude offer any concrete suggestions as to how Colorado could prevent such spillover.¹⁸¹

In the first months of Colorado’s experiment, authorities in surrounding states reported a surge in seizures of Colorado marijuana.¹⁸² States along

¹⁷⁷ *Id.* at 121.

¹⁷⁸ William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513, 514 (2015).

¹⁷⁹ See DeVeaux, *supra* note 22, at 1058 (arguing that the dormant Commerce Clause divests states of the authority to regulate their citizens’ extraterritorial conduct).

¹⁸⁰ See, e.g., A. Gregory Gibbs, *Anchorage: Gaming Capital of the Pacific Rim*, 17 ALASKA L. REV. 343, 374 (2000) (“Providing a legal gambling environment may exacerbate the problem of compulsive gambling, and is a cost to consider in the expansion of legalized gambling. As with most aspects of gambling behavior and its effects, there is a lack of good research into how threatening the compulsive gambling problem is . . .”).

¹⁸¹ But see W. David Ball, *Bring Back the Opium Den*, USA TODAY (Feb. 11, 2015), <http://www.usatoday.com/story/opinion/2015/02/11/marijuana-legislation-recreation-legalized-drug-alcohol-column/23254653/> [<http://perma.cc/HP4H-9RA4>] (lamenting that marijuana regulations “do not allow on-premises consumption in commercial establishments such as bars and restaurants” because “[t]he best way to limit diversion from the legal market . . . would be to shift all marijuana use, or at least as much as possible, to on-premises consumption”).

¹⁸² Associated Press, *supra* note 51; Deam, *supra* note 53 (reporting on the widespread apprehension in surrounding states about increased marijuana traffic coming from Colorado); Matt Ferner, *Keep Your Legal Weed in Colorado, Say Cops in Neighboring States*, HUFFINGTON POST (May 28, 2014), http://www.huffingtonpost.com/2014/05/28/colorado-marijuana_n_5405422.html [<http://perma.cc/E9AU-6HBP>] (reporting that “law enforcement officials in Nebraska counties that share a border with Colorado are frustrated over what they say has been a sharp rise in marijuana trafficking busts from the Centennial state”); David Hendee, *Nebraska on Its Own with Drug Enforcement Costs Tied to Colorado Pot Sales*, OMAHA WORLD-HERALD (Apr. 20, 2014), http://m.omaha.com/news/nebraska-on-its-own-with-drug-enforcement-costs-tied-to/article_d76f74a4-b109-5080-9d7b-4e26264686bc.html?mode=jqm [<http://perma.cc/FH7C-5ZP9>] (noting that those “on Nebraska’s marijuana frontier are biting the bullet over the costs of enforcing drug violations attributed to Colorado’s legalized pot”); Trevor Hughes, *In Tiny Nebraska Towns, a Flood of Colorado Marijuana*, USA TODAY (June 12, 2014), <http://www.usatoday.com/story/news/nation/2014/06/11/colorado-marijuana-exports/9964707/> [<http://perma.cc/7XKX-L8UC>] (asserting that Nebraska police officers along the Colorado border have seen a “massive influx of marijuana flowing into and through their communities”); John Ingold & Eric Gorski, *More Colorado Pot Is Flowing to Neighboring States, Officials Say*, DENVER POST (Sept. 3, 2013), http://www.denverpost.com/breakingnews/ci_24008061/more-colorado-pot-is-flowing-neighboring-states [<http://perma.cc/YPR3-Y5MH>] (reporting that that despite the difficulty of obtaining precise statistics “Colorado pot is clearly moving into neighboring

the Interstate 80 corridor have been the hardest hit,¹⁸³ but agents have seized Colorado cannabis as far away as Florida and New York.¹⁸⁴

Colorado voters legalized medicinal marijuana in 2000, permitting qualified individuals who obtained a “recommendation”¹⁸⁵ from a Colorado physician to receive a card authorizing them to grow and possess up to two ounces of the drug.¹⁸⁶ The law did not authorize the commercial sale of marijuana, medicinal or otherwise, and between 2001 and 2008 the number of individuals authorized to cultivate homegrown marijuana slowly grew to about 4800.¹⁸⁷ Beginning in 2009, Colorado began licensing commercial dispensaries to sell marijuana to qualified cardholders.¹⁸⁸ By November 2012, the State had licensed 532 dispensaries and the number of cardholders swelled to over 108,000.¹⁸⁹

Although Colorado’s pot program remained confined to medicinal purposes in name, it became an open secret that marijuana cards could be

states”); Amanda Kost & Jennifer Kovalski, *Colorado Weed Blamed for Increasing Law Enforcement Costs in Nebraska*, DENVER CHANNEL (May 25, 2014), <http://www.thedenverchannel.com/news/local-news/colorado-blamed-for-increasing-law-enforcement-costs-in-nebraska> [<http://perma.cc/XZ4P-T3KJ>] (finding that Colorado’s legalization of recreational marijuana may have increased the costs of drug enforcement in Nebraska); Ben Neary, *Wyoming Governor Braces for Influx of Colorado Pot*, MISSOULA MISSOULIAN (Sept. 14, 2013), http://missoulain.com/news/state-and-regional/wyoming-governor-braces-for-influx-of-colorado-pot/article_abd7b5b2-1c9f-11e3-ba78-001a4bcf887a.html [<http://perma.cc/ZS5P-MLSb>] (noting the concern held by Wyoming Governor Matt Mead about increased trafficking in his state following Colorado’s legalization of recreational marijuana).

¹⁸³ Hendee, *supra* note 182.

¹⁸⁴ Ingold & Gorski, *supra* note 182.

¹⁸⁵ Seeking to avoid federal criminal liability for its physicians, Colorado law provides that the state’s doctors do not “prescribe” medicinal marijuana. *Burns v. State*, 246 P.3d 283, 286 (Wyo. 2011) (noting that “Colorado law simply allows for a physician to certify that a patient might benefit from the use of marijuana as a medical treatment” (citing COLO. CONST. art. XVIII, § 14(c))). Colorado then left it “entirely up to the patient whether to apply for a medical marijuana registry card from the State of Colorado” and assigned the State itself (rather than a physician) to make “the final determination whether the patient qualifies for the registry card, thereby exempting the patient from criminal liability for possessing amounts of marijuana necessary for medicinal purposes.” *Id.* (citing COLO. CONST. art. XVIII, § 14(c)). “The recommendation language was carefully chosen; Supreme Court precedent in the abortion context had established the proposition that doctors could not be banned from discussing or recommending particular health care options. Thus a doctor who might lose [his or] her [Drug Enforcement Agency] license for prescribing a drug could ‘recommend’ it with impunity.” Chemerinsky et al., *supra* note 4, at 85 (footnotes omitted).

¹⁸⁶ 1 ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREAS, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT 2 (2013), <http://nrfocus.org/wp-content/uploads/2013/08/Legalization-of-MJ-in-Colorado-The-Impact.pdf> [<http://perma.cc/F5CY-Y9C3>] [hereinafter LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1].

¹⁸⁷ *Id.* at 5.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

easily procured by anyone willing to feign the most innocuous ailment.¹⁹⁰ A 2013 audit revealed that just twelve doctors had authorized half of the cards issued by the state.¹⁹¹ As the *Denver Post* candidly acknowledged in a 2013 editorial: “We don’t doubt some of those people fit the criteria for medical marijuana, but we also suspect many were just aching for marijuana.”¹⁹²

Thus, beginning in 2009, Colorado effectively legalized recreational pot for Coloradans willing to take the time to obtain a local doctor’s recommendation.¹⁹³ Since that time, the Rocky Mountain High Intensity Drug Trafficking Area (“HIDTA”), a federal agency within the National Office of Drug Control Policy,¹⁹⁴ has conducted three studies measuring the externalities—both inside Colorado and in surrounding states—arising from Colorado’s lax marijuana laws.¹⁹⁵

¹⁹⁰ See Lynn Bartels, *Denver Lawmaker Wants Medical-Pot Rules Clarified*, DENVER POST (Oct. 22, 2009), http://www.denverpost.com/rawnews/ci_13613617 [<http://perma.cc/2Q65-YBS7>] (reporting on Colorado Senator Chris Romer’s frustration with how Colorado’s medical marijuana laws have been exploited); Editorial, *Denver and Colorado Are Lost in a Fog on Pot Regulation*, DENVER POST (July 21, 2013) http://www.denverpost.com/ci_23688653/denver-and-colorado-are-lost-fog-pot-regulation [<http://perma.cc/2F6E-E9X9>] [hereinafter Editorial, DENVER POST] (reporting on the regulatory failures of Colorado’s legalization experiment); Leonardo Haberkorn, *Uruguay Leader Calls Colorado Pot Law a ‘Fiction,’* DENVER POST (May 2, 2014), http://www.denverpost.com/marijuana/ci_25684993/uruguays-president-calls-colorado-pot-law-fiction [<http://perma.cc/88EJ-HMXN>] (highlighting President of Uruguay Jose Mujica’s comments that Uruguay’s legal marijuana market will be more regulated and less based on “fiction” and “hypocrisy” than Colorado’s market); Rebecca Tonn, *Attorney General, Drug Task Force Shut Down Marijuana Ring in Colorado*, COLO. SPRINGS BUS. J. (Jan. 7, 2011), <http://csbj.com/2011/01/07/attorney-general-drug-task-force-shut-down-marijuana-ring/> [<http://perma.cc/9G4C-LMMR>] (providing an example of a growing trend in Colorado of parties growing marijuana under the guise of legalization and then illegally distributing it).

¹⁹¹ Editorial, DENVER POST, *supra* note 190.

¹⁹² *Id.*

¹⁹³ Colorado’s full-scale legalization of recreational pot is surely proving much worse for its neighbors. Although one did not have to suffer any real ailment to acquire cannabis under the state’s “medicinal” marijuana program, the law required consumers to obtain a recommendation from a Colorado physician and a state-issued card before they could purchase legal weed. LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 186, at 4–5. These requirements made it difficult for out-of-state residents—and particularly tourists—to partake in Colorado’s marijuana market. See Jack Healy, *In Line Early for Milestone on Marijuana*, N.Y. TIMES (Jan. 2, 2014), http://www.nytimes.com/2014/01/02/us/colorado-stores-throw-open-their-doors-to-pot-buyers.html?_r=0 [<http://perma.cc/4VHJ-9WB6>] (describing how the state’s new recreational-use laws eliminated these impediments).

¹⁹⁴ See *High Intensity Drug Trafficking Areas (HIDTA) Program*, OFF. NAT’L DRUG CONTROL POL’Y, <https://www.whitehouse.gov/ondcp/high-intensity-drug-trafficking-areas-program> [<http://perma.cc/H6SS-WQZM>] (explaining the HIDTA Program).

¹⁹⁵ LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 186, at 1; 2 ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT 1 (2014), <http://www.rmhidta.org/html/2014%20FINAL%20Legalization%20of%20MJ%20in%20Colorado%20the%20Impact%202.0.pdf> [<http://perma.cc/K32Y-JYHL>] [hereinafter LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2]; 3 ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE

From 2010 to 2014—a period when traffic fatalities dropped nearly 8% overall—the studies reveal that fatal car accidents involving drivers who tested positive for marijuana increased 92%.¹⁹⁶ In 2014, 20% of fatal car accidents involved a driver that was high on marijuana at the time of the crash.¹⁹⁷ In 2009, drugged drivers were responsible for just 10% of all fatal accidents.¹⁹⁸ In 2014 alone, marijuana-related traffic deaths increased 32% from the previous year.¹⁹⁹

These studies also reveal that Colorado has become a principal gateway through which marijuana enters the black markets of other states. In 2014, highway-patrol confiscations of Colorado pot bound for other states increased 592% from the 2008 total.²⁰⁰ In fact, confiscations increased 34% in 2014 over the previous year.²⁰¹ Investigators determined that the seized pot was bound for the black markets of at least thirty-six different states.²⁰² And from 2010 to 2014 the Postal Service reported a 2033% increase in intercepted parcels containing Colorado marijuana destined for other states.²⁰³ These interdictions undoubtedly constitute a small fraction of the Colorado marijuana funneled into neighboring states during the course of the studies.²⁰⁴

Predictably, since Colorado embraced its wide-open marijuana market the state has witnessed an explosion in pot-based tourism.²⁰⁵ HIDTA's studies strongly suggest that these out-of-state consumers are substantially con-

IMPACT 1 (2015), <http://www.rmhidta.org/html/2015%20FINAL%20LEGALIZATION%20OF%20MARIJUANA%20IN%20COLORADO%20THE%20IMPACT.pdf> [http://perma.cc/62T5-S4S7] [hereinafter LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 3].

¹⁹⁶ LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 3, *supra* note 195, at 1.

¹⁹⁷ *Id.* at 2.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1.

²⁰⁰ *Id.* at 102.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 123.

²⁰⁴ See LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2, *supra* note 195, at 108 (noting that authorities in neighboring states are “just scratching the tip of the iceberg compared to what [is] out there”).

²⁰⁵ Trevor Hughes, *Marijuana Tourists Sparking Up in Colorado's Ski Towns*, USA TODAY (July 10, 2014), <http://www.usatoday.com/story/news/nation/2014/07/10/colorados-marijuana-market-is-far-larger-than-predicted/12438069/> [http://perma.cc/3VKZ-UCXA]; John Ingold & Jason Blevins, *Marijuana Tourism Booms in Colorado, Though Officials Remain Skeptical*, DENVER POST (Apr. 20, 2014), http://www.denverpost.com/marijuana/ci_25601236/marijuana-tourism-booms-colorado-though-officials-remain-skeptical [http://perma.cc/RU6P-CZG5]; Aaron Smith, *Tourists Flock to Colorado to Smoke Legal Weed*, CNN MONEY (Aug. 22, 2014), http://money.cnn.com/2014/08/22/smallbusiness/marijuana-tourism-colorado/index.html?hpt=hp_t2 [http://perma.cc/LPR5-E9Q9].

tributing to both highway deaths and black-market trafficking in neighboring states.²⁰⁶

The officials charged with defending Colorado's regime openly acknowledge the extraterritorial costs of the state's venture. John Suthers, the state's Attorney General from 2005 to 2015, asserted that it is "clear that . . . Colorado is becoming a significant exporter of marijuana to the rest of the country."²⁰⁷ Cynthia Coffman, Suthers's successor, agreed with his assessment, admitting that "[i]llegal drug dealers are simply hiding in plain sight, attempting to use [Colorado's] legalized market as cover."²⁰⁸

The Task Force that Colorado created to implement its new marijuana laws openly acknowledged that "[a]dditional actions" are necessary "to limit diversion out of Colorado."²⁰⁹ Yet, short of instructing purchasers that it is unlawful to transport Colorado weed outside the state, it has done nothing to prevent diversion of marijuana into interstate black markets.²¹⁰

Voters and legislators in Colorado—and other states—will ultimately be called upon to judge whether the benefits of marijuana legalization justify its costs.²¹¹ The attendant injuries Colorado inflicts on its neighbors should be a part of its cost of doing business. Only then can other states decide whether Colorado's experiment is worth emulating.²¹²

²⁰⁶ See LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 186, at 4–5, 38, 52; LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2, *supra* note 195, at 7, 90, 113; LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 3, *supra* note 195, at 35–39.

²⁰⁷ Press Release, Cynthia Coffman, Attorney Gen., Colo. Dep't of Law, Attorney General Indicts Medical Marijuana Dispensary for Selling Out Back Door; Members of Multistate Drug Distribution Ring Also Indicted (Aug. 13, 2012), http://www.coloradoattorneygeneral.gov/press/news/2012/08/13/attorney_general_indicts_medical_marijuana_dispensary_selling_out_back_door_me [<http://perma.cc/GU2Q-JB3P>].

²⁰⁸ Press Release, Cynthia Coffman, Attorney Gen., Colo. Dep't of Law, Thirty-Two Person "Legal" Marijuana Drug Trafficking Conspiracy Dismantled (Mar. 26, 2015), https://www.coloradoattorneygeneral.gov/press/news/2015/03/26/thirty_two_person_%E2%80%9Clegal%E2%80%9D_marijuana_drug_trafficking_conspiracy_dismantled [<http://perma.cc/A35B-QY2T>].

²⁰⁹ JOHN HICKENLOOPER ET AL., STATE OF COLO., TASK FORCE REPORT ON THE IMPLEMENTATION OF AMENDMENT 64: REGULATION OF MARIJUANA IN COLORADO 50 (2013), <http://www.colorado.gov/cms/forms/dor-tax/A64TaskForceFinalReport.pdf> [<http://perma.cc/FH4N-EPNL>] [hereinafter TASK FORCE REPORT].

²¹⁰ See *id.*

²¹¹ See Jessica Bulman-Pozen, *Unbundling Federalism: Colorado's Legalization of Marijuana and Federalism's Many Forms*, 85 U. COLO. L. REV. 1067, 1082 (2014) ("Across the country, individuals and groups both in favor of and opposed to legalization of marijuana have recognized [Colorado's decision to decriminalize recreational marijuana] not as a local matter with import only for the people of Colorado, but as a national contest with significance for the entire country.").

²¹² A comprehensive assessment of the costs and benefits is more important in the case of drug decriminalization than in other legal reforms. As commentators have noted:

The oft-heard plea for legalization "experiments" is . . . remote from the world of practice. Re-prohibiting a legal drug would be a much costlier business than continuing to prohibit an illegal one. The increase in costs would be directly proportional to the increase in market size brought about by legalization. In the circumstance where reversal

4. Nebraska and Oklahoma Lack Standing to Assert Their Federal-Supremacy Claim

Instead of following the well-worn path laid by the Supreme Court's transboundary nuisance precedents, Nebraska and Oklahoma chose to predicate their suit on a novel theory. They argue that the CSA preempts Colorado's marijuana decriminalization laws and thus the state's pot-friendly stance violates the Supremacy Clause.²¹³ Although Colorado's initiative might be at

would be most called for—an explosion in consumption—enforcement costs would be greatest and the probability of a failed re-prohibition highest. As Humpty-Dumpty demonstrated, not all processes are reversible. While irreversibility is not itself an argument for the status quo, it is an argument for caution.

Mark A.R. Kleiman & Aaron J. Saiger, *Drug Legalization: The Importance of Asking the Right Question*, 18 HOFSTRA L. REV. 527, 544 (1990).

²¹³ Some scholars contend that Nebraska and Oklahoma should voluntarily dismiss their action against Colorado and sue the Obama Administration “to force the [A]ttorney [G]eneral to enforce [the CSA] which undoubtedly is supreme over Colorado law.” Jess Bravin, *Supreme Court Seeks Obama Administration Comment on Marijuana Case*, WALL ST. J. (May 4, 2015), <http://www.wsj.com/articles/supreme-court-seeks-obama-administration-comment-on-marijuana-case-1430750718> [<http://perma.cc/NL68-FYRG>] (quoting University of Texas Professor Sanford Levinson); accord Randy Barnett, *Another Misbegotten Reliance on Gonzales v. Raich*, VOLOKH CONSPIRACY (Dec. 31, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/31/another-misbegotten-reliance-on-gonzales-v-raich/> [<http://perma.cc/86VQ-4LHK>] (arguing that because Congress cannot make Colorado pass a law criminalizing marijuana “[t]he only constitutional remedy for this interstate effect is a federal law like the CSA that will be enforced by the federal government”); Michael C. Dorf, *Nebraska and Oklahoma Take Colorado to the Supreme Court over Legalized Marijuana*, VERDICT (Dec. 31, 2014), <https://verdict.justia.com/2014/12/31/nebraska-oklahoma-take-colorado-supreme-court-legalized-marijuana> [<https://perma.cc/SF4D-4QCV>] (outlining various reasons why Nebraska's and Oklahoma's lawsuit “rests on a conceptual error”). In our view, this argument ignores the principles governing the exercise of executive power in uncertain cases. As the Supreme Court reaffirmed last June, “[i]n considering claims of presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*,” decided in 1952. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015); accord *Dames & Moore v. Regan*, 453 U.S. 654, 661, 674, 690–91 (1981) (unanimously holding that Justice Jackson's methodology governs such cases); see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). *Youngstown* addressed President Truman's unilateral seizure of the American steel industry when a labor dispute threatened production during the height of the Korean War. *Youngstown*, 343 U.S. at 582–83 (majority opinion). The Court struck down the President's action. *Id.* at 589. Justice Jackson asserted that “presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.” *Id.* at 635 (Jackson, J., concurring). He offered a three-zone template to evaluate the scope of executive power. *Id.* at 635–38. In the first zone, “the President acts pursuant to an express or implied” congressional authorization. *Id.* at 635. Endowed with such legislative approval, the President's power “is at its maximum, for it includes all that he possesses in his own right, plus all that Congress can delegate.” *Id.* In the second zone, “the President acts in absence of either a congressional grant or denial of authority.” *Id.* at 637. Zone three involves situations where “the President takes measures incompatible with the expressed or implied will of Congress.” *Id.* Here, “his power is at its lowest ebb, for he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” *Id.* Thus, if a presidential act falls within the Justice Jackson's third zone, it may only be sustained if it constitutes an exercise of “preclusive” Article II power. See *id.* at 638. For example, congressional nullification

odds with the CSA,²¹⁴ Nebraska and Oklahoma lack standing to assert their federal-supremacy claim for two reasons. First, they lack the sort of “concrete and particularized” injury required to bring such a claim.²¹⁵ Second, the Supremacy Clause “does not create a cause of action”; thus, absent express statutory authorization, the Clause “leave[s] the enforcement of federal law to federal actors.”²¹⁶ It is well settled that “there is no private right of action under the Controlled Substances Act.”²¹⁷

of presidential pardons would be invalid because authority to issue pardons is a preclusive Article II power. *See* U.S. CONST. art. II, § 2, cl. 3; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141–42 (1871). Justice Jackson concluded that the steel seizure fell within the third zone because prior statutes tacitly prohibited the president’s action. *Youngstown*, 343 U.S. at 639–40 (Jackson, J., concurring). “Congress has not left seizure of private property an open field, but has covered it by statutory policies inconsistent with the seizure.” *Id.* at 639. While deliberating the Labor Management Relations Act of 1947, Congress considered a draft of the bill giving the president the power to seize private enterprises in emergency situations, but declined to enact such legislation. *Id.* at 601–02. From this, Justice Jackson inferred implicit congressional negation of such power. *Id.* at 639–40. Because the power to seize private property does not fall within any field of preclusive executive authority, the Court invalidated the president’s order. *Id.* at 589 (majority opinion). In the present controversy, the Obama Administration has refused to enforce the CSA’s marijuana prohibitions against those complying with Colorado’s mandates. *See* Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, to U.S. Attorneys (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<http://perma.cc/R5KN-4PXE>] (providing guidance on the Department of Justice’s position on enforcement of the CSA). President Obama’s refusal to enforce the federal marijuana ban is “incompatible with the expressed . . . will of Congress.” *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Thus, his decision not to enforce the CSA in Colorado, like President Truman’s steel seizure, falls within the third zone of Justice Jackson’s taxonomy. But, in our view, assertions that the courts can force the President’s hand ignore a crucial distinction between President Obama’s action (or inaction) and the steel seizure. “As Justice Jackson wrote in *Youngstown*, when a [p]residential power is ‘exclusive,’ it ‘disab[les] the Congress from acting upon the subject.’” *Zivotofsky*, 135 S. Ct. at 2095 (quoting *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring) (second alternation in original) (emphasis added)). It is long settled that “the Executive Branch”—not Congress or the courts—“has exclusive authority and absolute discretion to decide whether to prosecute a case.” *United States v. Nixon*, 418 U.S. 683, 693 (1974) (emphasis added); *accord* *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869). Because prosecutorial discretion is an exclusive presidential power, *see Nixon*, 418 U.S. at 693, the Constitution “disab[les] the Congress” from interfering with the President’s exercise of this power. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring); *accord Zivotofsky*, 135 S. Ct. at 2095. As such, the courts are without power to issue relief, notwithstanding the CSA’s provisions. *See id.*

²¹⁴ *See* Zachary Bolitho, *The Case Against Colorado’s Pot Law*, L.A. TIMES (June 25, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0625-bolitho-colorado-preempt-20150624-story.html> [<http://perma.cc/KMX9-NKEX>] (“[I]f a state law interferes with congressional policies and objectives, it cannot stand. That’s precisely what we have with Colorado’s marijuana law and the CSA. . . . If states are free to disregard federal laws they don’t like, then our entire governmental structure is at risk.”).

²¹⁵ *See infra* notes 218–243 and accompanying text (asserting that Nebraska and Oklahoma lack “concrete and particularized” injuries of the type required to pursue their federal-supremacy suit).

²¹⁶ *Armstrong v. Exceptional Child Ctr., Inc.* 135 S. Ct. 1378, 1383–34 (2015).

²¹⁷ *Felmler v. Oklahoma*, No. 13-CV-0803-CVE-TLW, 2014 WL 4597724, at *6 (N.D. Okla. Sept. 15, 2014) (denying the plaintiff’s claim under the controlled substance act because “there is no private right of action under the Controlled Substance Act”); *accord Durr v. Strickland*, 602

a. Nebraska and Oklahoma Lack “Concrete and Particularized” Injuries of the Type Required to Pursue Their Federal-Supremacy Suit

To satisfy Article III’s standing requirement, a party must establish more than “a keen interest in the issue” being litigated.²¹⁸ The litigant must establish an “injury in fact” by proving that he or she “has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.”²¹⁹ Nebraska’s and Oklahoma’s complaint asserts that they “have dealt with a significant influx of Colorado-sourced marijuana,”²²⁰ forcing them to endure “increased costs for the apprehension, incarceration, and prosecution of suspected and convicted felons.”²²¹ Such expenses constitute concrete and particularized transboundary nuisance injuries.²²² But Nebraska and Okla-

F.3d 788, 789 (6th Cir. 2010) (reasoning that the use of sodium thiopental as a means of execution cannot form the basis of a declaratory relief under the CSA because no private right of action exists under the CSA); *Brown v. Endo Pharms., Inc.*, 38 F. Supp. 3d 1312, 1320 n.5 (S.D. Ala. 2014) (noting that the CSA does not create a duty of care owed by a pharmaceutical manufacturer to an end user because the CSA does not create a private remedy); *United States v. Real Property & Improvements Located at 1840 Embarcadero, Oakland, Calif.*, 932 F. Supp. 2d 1064, 1072 (N.D. Cal. 2013) (rejecting a claim under the CSA to enjoin criminal use of a property because “there is no private right of action under the CSA to force compliance”); *Link v. Luebbers*, 830 F. Supp. 2d 729, 734 (E.D. Mo. 2011) (recognizing that the CSA does not create a private cause of action); *Ringo v. Lombardi*, 706 F. Supp. 2d 952, 956 (W.D. Mo. 2010) (noting that the plaintiff concedes the CSA provides no private right of action for enforcement but nevertheless seeks a declaration that defendant’s actions would violate the CSA); *Jones v. Hobbs*, 745 F. Supp. 2d 886, 893–94 (E.D. Ark. 2010) (reasoning that “to entertain . . . a cause of action brought by private parties seeking a declaration that the . . . CSA has been violated would, in effect, evade the intent of Congress not to create private rights of action under those statutes”); *McCallister v. Purdue Pharma L.P.*, 164 F. Supp. 2d 783, 793 (S.D. W. Va. 2001) (reviewing the CSA and finding that it “establishes no [c]ongressional intent to create a private, civil right of action nor to permit removal”).

²¹⁸ *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

²¹⁹ *Id.* at 2661, 2663.

²²⁰ Complaint, *supra* note 9, at 25.

²²¹ *Id.* at 26.

²²² Nebraska and Oklahoma have not pled their injuries with the level of particularity required to invoke the Supreme Court’s original jurisdiction. “[T]he solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure . . . does not suit cases within [the Supreme] Court’s original jurisdiction.” *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1993). Although not as rigorous as the standard imposed in fraud causes of action, the Court requires claims be pled with a greater level of detail than is ordinarily required for notice pleading: “A State asking leave to sue another . . . must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor.” *Alabama v. Arizona*, 291 U.S. 286, 291 (1934). Further, to obtain relief, a State must prove its case by more than a simple preponderance of evidence. “[T]he threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence” before relief may be granted. *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Thus, to invoke the Court’s jurisdiction, a plaintiff-State’s complaint must allege facts with sufficient particularity to demonstrate that it could carry its burden of proving its enhanced burden of proof. To satisfy this burden in a marijuana nuisance action, we believe the Complaint must include statistical evidence demonstrating with some precision the harm Colorado pot is

homa ignore a critical aspect of the standing doctrine. To demonstrate the requisite injury-in-fact, it is insufficient to simply allege harm at the hands of a defendant. To possess standing the plaintiff must allege the “*type of injury*” the cause of action pled is designed to redress.²²³

The injuries alleged by Nebraska and Oklahoma constitute precisely the kind of harm the federal common law of nuisance is meant to remedy. “The essential function” of such a suit is “to provide a civil means to redress ‘a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public.’”²²⁴ But Nebraska’s and Oklahoma’s suit is not a nuisance cause of action. Instead, they seek to “enforce . . . the Supremacy Clause, Article VI of the U.S. Constitution.”²²⁵ This claim is unavailing.

Unlike the transboundary nuisance doctrine, the Supremacy Clause vindicates the federal government’s interests, protecting it “from the division of [its] power” by state actors.²²⁶ Absent express congressional intent

inflicting. This could include things like statistical data on highway accidents, the amount of marijuana interdicted that originated in Colorado, arrest rates, and increases in law-enforcement spending. The Nebraska-Oklahoma pleadings, in our view, do not meet this burden. They allege their shared injury only in very general terms:

The significant increase in the trafficking of marijuana has led to the diversion of a substantial amount of personnel time, budget, and resources of the Plaintiff States’ law enforcement, judicial system, and penal system to counteract such trafficking. Plaintiff States have and will continue to incur considerable costs associated with the increased level of incarceration of suspected and convicted felons on charges related to Colorado-sourced marijuana including housing, food, health care, transportation to and from court, counseling, clothing, and maintenance.

Opening Brief, *supra* note 9, at 8–9. To satisfy the heightened standards required to invoke original jurisdiction, the complaint should be amended to include figures demonstrating the degree and magnitude of the harm inflicted by Colorado’s venture. Conclusory assertions that the venture is causing “considerable” harm do not allege facts demonstrating the plaintiffs can prove their claims by clear and convincing evidence. *See id.* A *New York Times* columnist characterized the complaint’s allegations as “imprecise weasel words.” Lawrence Downes, *A Great Plains Border War, over Cannabis*, N.Y. TIMES: TAKING NOTE (Dec. 19, 2014), http://takingnote.blogs.nytimes.com/2014/12/19/a-great-plains-border-war-over-cannabis/?_r=0 [http://perma.cc/2B8M-BACJ]. We agree. Nebraska and Oklahoma have failed to plead the predicate facts necessary to invoke the Supreme Court’s original jurisdiction. Thus, their suit must be dismissed. *See* Jessica J. Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, 45 MCGEORGE L. REV. 635, 639 (2014) (noting that the lack of “subject-matter jurisdiction stands alone as the single unwaivable defect” in federal litigation).

²²³ *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 349–50 (1990) (Stevens, J., dissenting) (emphasis added).

²²⁴ *Tull v. United States*, 481 U.S. 412, 421 (1987) (quoting WILLIAM L. PROSSER, *LAW OF TORTS* 583 (4th ed. 1971)).

²²⁵ Complaint, *supra* note 9, at 1.

²²⁶ *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 118 (1989).

to the contrary, the Clause “leave[s] the enforcement of federal law to federal actors.”²²⁷

Nebraska and Oklahoma assert that Colorado’s decriminalization of marijuana “undermines federal priorities in the area of drug control and enforcement” and “interferes with U.S. foreign relations and broader narcotic and psychotropic-drug-trafficking interdiction and security objectives,” thereby harming “a wide range of U.S. interests.”²²⁸ These acts may harm the federal government. “No one doubts that a [sovereign] has a cognizable interest” in the enforcement of its own laws.²²⁹ But these alleged affronts to the federal government do not harm Nebraska and Oklahoma in a “concrete and particularized” way.²³⁰

To have standing, a litigant “must allege a distinct and palpable injury to himself”²³¹—he “must seek relief for an injury that affects him in a ‘personal and individual way.’”²³² Where, as in the present case, a suit concerns the enforceability of a law, those who “have no role . . . in the enforcement” of that law “have no ‘personal stake’ in defending its enforcement that is distinguishable from the general interest of every citizen” of the polity that enacted it.²³³ “No matter how deeply committed” a litigant “may be to upholding” a particular law, “that is not a ‘particularized’ interest sufficient to create a case or controversy under Article III.”²³⁴

In order to have the requisite “role . . . in the enforcement” of a law, a litigant must be a “designate[d] agent[]”²³⁵ of the jurisdiction that enacted it.²³⁶ This requirement ensures the political accountability of those litigating government interests. “If the relationship between two persons is one of agency . . . the agent owes a fiduciary obligation to the principal.”²³⁷ Conversely, nonagents “owe nothing of the sort to the people” of the sovereign, leaving them “free to pursue purely ideological commitment[s] . . . without the need to take cognizance of resource constraints, changes in public opin-

²²⁷ *Armstrong*, 135 S. Ct. at 1383–84.

²²⁸ Complaint, *supra* note 9, at 21.

²²⁹ *Hollingsworth*, 133 S. Ct. at 2664.

²³⁰ *See id.* at 2661.

²³¹ *Gollust v. Mendell*, 501 U.S. 115, 126 (1991) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

²³² *Hollingsworth*, 133 S. Ct. at 2662 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

²³³ *Id.* at 2663.

²³⁴ *Id.*

²³⁵ *Id.* at 2663–64.

²³⁶ *Id.* at 2666.

²³⁷ *Id.* at 2667.

ion, or potential ramifications for [the sovereign's] other . . . priorities."²³⁸ While Nebraska and Oklahoma indisputably have a role in the enforcement of their *own* drug laws, they are not "designat[ed] agents" of the federal government.²³⁹ Thus, they lack the requisite "role . . . in the enforcement" of the CSA.²⁴⁰

Implicitly recognizing this deficiency, Nebraska and Oklahoma assert that they have been forced to defend the federal government "[b]ecause the current federal administration seems unwilling" to do so.²⁴¹ This argument too is unavailing. It is "a fundamental restriction on" the authority of federal courts that "in the ordinary course, a litigant must assert his or her own rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."²⁴² And the Supreme Court has explicitly held that when a sovereign's interests are at stake in litigation, nonagents of that sovereign are not empowered to represent those interests merely because "the public officials charged with that duty refuse to do so."²⁴³ As such, Nebraska's and Oklahoma's federal-supremacy suit should be dismissed for lack of standing.

b. A Cause of Action Cannot Be Predicated on a Mere Violation of the Supremacy Clause

Nebraska's and Oklahoma's claim does not rest on a statutory or common law cause of action—it is predicated on the Supremacy Clause itself.²⁴⁴ But as the Supreme Court recently explained the Clause "is not the source

²³⁸ *Id.* The Attorneys General of Nebraska and Oklahoma are *state* elected officials. Because they do not stand for *federal* election, they are not accountable to the sovereign that is allegedly harmed by Colorado's violation of the CSA.

²³⁹ See *Hollingsworth*, 133 S. Ct. at 2664.

²⁴⁰ See *id.* at 2663.

²⁴¹ Opening Brief, *supra* note 9, at 10.

²⁴² *Hollingsworth*, 133 S. Ct. at 2663 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

²⁴³ *Id.* at 2660, 2666–67. In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 520 (2007), the Court concluded that Massachusetts was "entitled to special solicitude in [the] standing analysis." *Id.* But this remark provides no support to the Nebraska-Oklahoma claim for two reasons. First, that case was not predicated on the Supremacy Clause, but sought judicial review of an environmental-nuisance action that was initially properly brought to the EPA, the forum that "Congress provides for the pursuit of such claims." *Milwaukee II*, 451 U.S. at 326; accord *Massachusetts*, 549 U.S. at 518–19 ("Just as Georgia's independent interest 'in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory [from harm caused by air pollution] today." (quoting *Tennessee Copper I*, 206 U.S. at 237)). Second, unlike the CSA, Congress explicitly authorized such actions in the Clean Air Act. *Massachusetts*, 549 U.S. at 516 (citing 42 U.S.C. § 7607(b)(1) (2012)). The Court explicitly noted that Massachusetts was entitled to "special solicitude" because of Congress's express authorization of such suits and because of the Commonwealth's "stake in protecting its quasi-sovereign interests." *Id.* at 520.

²⁴⁴ Complaint, *supra* note 9, at 1.

of any federal rights” and it “certainly does not create a cause of action.”²⁴⁵ Rather, it “merely creates a rule of decision.”²⁴⁶ It “establishes a constitutional choice-of-law rule, mak[ing] federal law paramount.”²⁴⁷ If the Supremacy Clause made “it impossible to leave the enforcement of federal law to federal actors” the federal government’s “ability to guide the implementation of federal law” would be “significantly curtail[ed].”²⁴⁸

Seeking to avoid the import of this holding, Nebraska and Oklahoma assert that “federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law.”²⁴⁹ But this caveat only applies when the plaintiff has pled an independent cause of action that is recognized by common law or authorized by statute. Once such a cause of action “properly comes before a court, judges are bound [to apply] federal law” over any conflicting state law.²⁵⁰ In a transboundary nuisance action the federal common law of nuisance would thus supersede any contradictory state law.²⁵¹ But Nebraska and Oklahoma have eschewed such a claim.

The only conceivable basis for their suit independent of the Supremacy Clause is the violation of the CSA itself. But this too is a nonstarter. “[I]f Congress does not intend for a statute to supply a cause of action for its enforcement, it makes no sense to claim that the Supremacy Clause itself must provide one.”²⁵² It is well settled that “there is no private right of action under the Controlled Substances Act.”²⁵³ As such, Nebraska’s and Oklahoma’s cause of action is not viable.

²⁴⁵ *Armstrong*, 135 S. Ct. at 1383.

²⁴⁶ *Id.*

²⁴⁷ *Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 162 P.3d 569, 571 (Cal. 2007); *accord Armstrong*, 135 S. Ct. at 1383.

²⁴⁸ *Armstrong*, 135 S. Ct. at 1383–84.

²⁴⁹ Reply Brief, *supra* note 9, at 7 (quoting *Armstrong*, 135 S. Ct. at 1384).

²⁵⁰ *Armstrong*, 135 S. Ct. at 1384.

²⁵¹ *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (explaining that under the Supremacy Clause, federal common law of nuisance supersedes contradictory state law).

²⁵² *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1212 (2012) (Roberts, C.J., dissenting). The majority’s opinion “d[id] not address” whether the Supremacy Clause conferred standing to nonfederal litigants. *Id.* at 1211. A majority of the Court later adopted the Chief Justice’s view. *See Armstrong*, 135 S. Ct. at 1383–84.

²⁵³ *Felmlee*, 2014 WL 4597724, at *6; *accord Durr*, 602 F.3d at 789; *Brown*, 38 F. Supp. 3d at 1320 n.5; *1840 Embarcadero*, 932 F. Supp. 2d at 1070; *Link*, 830 F. Supp. 2d at 734; *Ringo*, 706 F. Supp. 2d at 956; *Jones*, 745 F. Supp. 2d at 893–94; *McCallister*, 164 F. Supp. 2d at 783. Three of these cases were brought by death-row inmates asserting that the lethal-injection drugs their states utilized were banned by the CSA. *See Durr*, 602 F.3d at 789; *Felmlee*, 2014 WL 4597724, at *6; *Jones*, 745 F. Supp. 2d at 893–94. If the harm they faced—a prolonged and agonizing death—was insufficient to confer standing, it defies logic to believe that Nebraska and Oklahoma could clear this hurdle.

*B. Marijuana Differs Fundamentally from Other Goods Whose
Legality Vary from State to State*

Some commentators assert that a judgment against Colorado will “set a very dangerous precedent”—inviting retaliatory suits between neighboring states.²⁵⁴ One scholar predicts “it won’t be long before New York and other northeastern states are in federal court arguing that Oklahoma, Nebraska, and other states have an affirmative obligation to control greenhouse gas emissions.”²⁵⁵ We disagree.

As noted above, interstate air and water disputes once comprised a relatively large part of the Court’s docket. But Congress has since preempted the Court’s jurisdiction over such disputes by “provid[ing] a forum for the pursuit of such claims before [an] expert agenc[y],” the EPA.²⁵⁶ Indeed, such disputes remain relatively common today.²⁵⁷ But the Supreme Court has explicitly held that they cannot be the basis of original actions before the Supreme Court.²⁵⁸

Another scholar similarly asserts that if a neighboring state can prevail in an original action against Colorado, then “states that have less restrictive labor regulations” statutes will be targets for suits.²⁵⁹ Again, we disagree. Even if divergent state labor laws could create a transboundary nuisance—

²⁵⁴ Ilya Somin, *Dangerous Implications of the Nebraska-Oklahoma Lawsuit Against Marijuana Legalization in Colorado*, VOLOKH CONSPIRACY (Dec. 19, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/19/dangerous-implications-of-the-nebraska-oklahoma-lawsuit-against-marijuana-legalization-in-colorado/> [<http://perma.cc/2Z7L-PYZ9>]; accord Barnett, *supra* note 213.

²⁵⁵ Adler, *supra* note 161.

²⁵⁶ *Milwaukee II*, 451 U.S. at 326; see *Am. Elec. Power Co.*, 131 S. Ct. at 2539. These opinions do not suggest that Congress has similarly preempted the Court’s jurisdiction over an original nuisance action challenging Colorado’s marijuana regime. Although Congress has classified marijuana as a nuisance, it has not assigned cross-border nuisance disputes involving the drug to an “expert agenc[y].” *Milwaukee II*, 451 U.S. at 326; see *infra* notes 286–333 and accompanying text (distinguishing air and water pollution disputes from marijuana disputes because marijuana disputes have not been delegated to an expert agency for adjudication).

²⁵⁷ See, e.g., *Am. Elec. Power Co.*, 131 S. Ct. at 2532 (addressing the question of whether several states, the city of New York, and three private land trusts can successfully claim public nuisance against four private power companies and the federal Tennessee Valley Authority for emitting harmful amounts of carbon dioxide); *Massachusetts*, 549 U.S. at 518–19 (recognizing the right of the EPA to protect Massachusetts by prescribing vehicle emission standards); *Arkansas v. Oklahoma*, 503 U.S. 91, 98–99 (1992) (accepting the role of the EPA to “veto a source [s]tate’s issuance of any permit if the waters of another [s]tate may be affected”); *Int’l Paper Co.*, 479 U.S. at 490–91 (asserting that “[a]n affected [s]tate’s only recourse is to apply to the EPA [A]dministrator, who then has the discretion to disapprove the [source state’s] permit if he [or she] concludes that the discharges will have an undue impact on interstate waters”).

²⁵⁸ *Am. Elec. Power Co.*, 131 S. Ct. at 2536 (finding the Clean Air Act preempts federal common law of nuisance with regard to interstate air pollution); *Milwaukee II*, 451 U.S. at 314 (finding amendments to the Clean Water Act preempt federal common law of nuisance with regard to pollution of interstate bodies of water).

²⁵⁹ Somin, *supra* note 254.

and it is unclear how they could—Congress likewise has assigned such disputes to an expert agency. “Congress has created by statute a uniform body of laws governing” labor disputes substantially affecting interstate commerce “and has vested in the National Labor Relations Board the exclusive jurisdiction over administration of those laws.”²⁶⁰

Although the parade of horrors suggested by these scholars may be dismissed, a legitimate concern lies at their core. Many commercial goods may be legally possessed in one state but are outlawed in others: for example, moonshine,²⁶¹ fireworks,²⁶² radar detectors,²⁶³ and unpasteurized milk.²⁶⁴ We recognize that our thesis begs the question of whether awarding Colorado’s neighbors relief for pot-related damages will open a Pandora’s box, inviting original actions challenging the intrastate sale of these other products.

While we do not undertake a complete examination of the laws governing such chattels, it is doubtful that a state may be successfully sued for creating a nuisance by allowing the introduction of any of these articles into interstate commerce. The jurisprudence governing such actions includes two important limiting principles that likely thwart any such suits.

First, as the Court explained in *Missouri v. Illinois*, plaintiff-States are subject to the unclean-hands doctrine.²⁶⁵ A State cannot obtain equitable relief if it engages—even to a lesser degree—in the challenged conduct.²⁶⁶ When a plaintiff “deliberately permits” conduct “similar to [that] of which it complains,” it cannot claim that the defendant’s acts are wrongful and

²⁶⁰ *Int’l Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 394 n.10 (1986).

²⁶¹ *State v. Altman*, 106 So. 2d 401, 403 n.1 (Fla. 1958) (noting that the legality of different types of moonshine varies from state to state).

²⁶² *See Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 668 (7th Cir. 1986) (holding Wisconsin possessed personal jurisdiction over a Minnesota fireworks distributor based on its sale of products that were legal in Minnesota but illegal in Wisconsin because it profited from sending fireworks to a neighboring state where it knew that fireworks were illegal).

²⁶³ William A. Drennan, *The Patent Office Is Promoting Shocking New Tax Loopholes—Should the Empire Strike Back?*, 60 OKLA. L. REV. 491, 510–11 (2007) (noting that radar detectors are legal in some states and illegal in others).

²⁶⁴ Damian C. Adams et al., *Déjà Moo: Is the Return to Public Sale of Raw Milk Udder Nonsense?*, 13 DRAKE J. AGRIC. L. 305, 306 (2008) (noting although the Food and Drug Administration requires that all milk that enters interstate commerce be pasteurized, the agency permits states to regulate intrastate milk sales; thus, some states require milk to be pasteurized, whereas others permit the sale of raw milk).

²⁶⁵ *See Missouri II*, 200 U.S. at 522. The Court denied Missouri relief despite its proving that Illinois had allowed Chicago to discharge substantial amounts of untreated sewage into the Mississippi River because Missouri had allowed its own towns upstream from St. Louis to engage in the same conduct. *Id.* The Court was unmoved by the apparent fact that the towns along the river above St. Louis were necessarily much smaller than Chicago and their sewage discharges were not of the magnitude of those challenged. *Id.*; see also Merrill, *supra* note 27, at 999 (noting that *Missouri v. Illinois* “alludes twice to the equitable doctrine of unclean hands”).

²⁶⁶ *Missouri II*, 200 U.S. at 522.

“courts should not be curious to apportion the blame.”²⁶⁷ Thus, in order to prevail in an equitable suit involving the sale of a chattel, the State bringing the action would likely have to ban the good almost entirely.²⁶⁸

Second, the law of nuisance does not reward the prudish. To qualify as a nuisance, the offending behavior cannot be of a type that would be offensive only to a person of “fastidious taste.”²⁶⁹ Whether something constitutes a nuisance “is measured by ordinary sensibilities, tastes, and habits.”²⁷⁰ Thus, before a state’s decision to permit the sale of a good can be condemned as a nuisance, a general consensus must exist among the majority of states that the article constitutes a nuisance.

The Twenty-First Amendment gives Kansas the power to outlaw beer if it chose to do so.²⁷¹ But if it enacted such a law, it would be an outlier. Since Prohibition’s end, the ordinary sensibilities of every state have accepted alcohol as permissible.²⁷² Although the Constitution entitles it to adopt such a policy, a state taking such an extreme position cannot use the federal common law of nuisance to force its “fastidious tastes” on its neigh-

²⁶⁷ *Id.*

²⁶⁸ Almost any original action targeting a state because of lenient gun laws would founder on this principle. We do note that if a state radically departed from conventional norms governing firearms regulation—i.e., by openly facilitating the sale of guns to out-of-state felons—it might have legitimate concerns over such a suit (assuming that such an action could withstand Second Amendment scrutiny). We reserve consideration of the implications of our theory to state gun laws for a future article.

²⁶⁹ *Fowler v. Fayco, Inc.*, 275 So. 2d 665, 669 (Ala. 1973) (“The inconvenience complained of must not be fanciful, or such as would affect only one of a fastidious taste, but it should be such as would affect an ordinary reasonable man.” (quoting ALA. CODE § 6-5-120 (1975))); *accord Shatto v. McNulty*, 509 N.E.2d 897, 899 (Ind. Ct. App. 1987) (noting that whether an act is a nuisance “is measured by ordinary sensibilities, tastes, and habits in light of the circumstances of each case”); *see also, e.g., North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 310 (4th Cir. 2010) (rejecting an injunction based on public nuisance because the activities complained of would not have substantially interfered with a person of ordinary health and sensibilities); *Barrett v. Atl. Richfield Co.*, 95 F.3d 375, 383 (5th Cir. 1996) (finding that plaintiff failed to establish the elements of a nuisance claim because it could not “demonstrate a substantial interference with the use or enjoyment of their property or an injurious effect on the public health, safety, or welfare”); *French v. Ass’n for Works of Mercy*, 39 App. D.C. 406, 412 (D.C. Cir. 1912) (identifying the perspective for measuring a nuisance as that of “persons with ordinary sensibilities and of ordinary tastes and habits”).

²⁷⁰ *Shatto*, 509 N.E.2d at 899; *accord, e.g., Cooper*, 615 F.3d at 310; *Barrett*, 95 F.3d at 383; *French*, 39 App. D.C. at 412.

²⁷¹ In addition to repealing the Eighteenth Amendment, the Twenty-First Amendment also expressly prohibits “The transportation or importation” of “intoxicating liquors” into “any State, Territory, or possession of the United States . . . in violation of the laws thereof.” U.S. CONST. amend. XXI.

²⁷² *See Sharon E. Conaway, Comment, The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability*, 82 NW. U. L. REV. 403, 438 (1988) (noting that “no state prohibits the purchase of alcohol by a sober adult”).

bors.²⁷³ Likewise, products like radar detectors and fireworks—although not universally accepted—are legal in most states.²⁷⁴

In contrast to alcohol, radar detectors, and fireworks,²⁷⁵ federal law categorizes marijuana as a nuisance.²⁷⁶ And although public opinion on marijuana is plainly changing, the laws of forty-six states consider recreational use of the drug a criminal act.²⁷⁷ In this case, it is Colorado—not its neighbors—that is the outlier.²⁷⁸

²⁷³ See Fowler, 575 So. 2d at 669.

²⁷⁴ Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 683 (2006) (stating that “only two jurisdictions statutorily prohibit radar detectors: Virginia and the District of Columbia”); John W. Ragsdale, Jr., *Treaty-Based Exclusions from the Boundaries and Jurisdiction of the States*, 71 UMKC L. REV. 763, 779–80 n.96 (2003) (noting that “consumer fireworks[] are generally legal in the majority of states”).

²⁷⁵ Although other banned chattels will invariably be drawn into interstate commerce, marijuana’s high commercial value makes it more likely that the intrastate distribution of the drug will result in its introduction into interstate black markets. The drug is the most lucrative commercial cash crop in the United States. Venkataraman, *supra* note 55. These factors virtually guarantee that “the high demand in the interstate market will draw such marijuana [acquired intrastate] into that market” and will thereby have “a substantial effect on supply and demand in the national market for that commodity.” *Raich*, 545 U.S. at 19.

²⁷⁶ See 21 U.S.C. § 812(c) (2012); *infra* notes 286–333 and accompanying text (describing how Congress has established that the recreational marijuana market constitutes an interstate nuisance).

²⁷⁷ Twenty-three states have chosen to legalize marijuana for medicinal purposes. *State Medical Marijuana Laws*, NAT’L CONF. ST. LEGISLATURES (Aug. 11, 2015), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#3> [<http://perma.cc/HNN7-AAPK>]. This does not undermine the conclusion that the vast majority of states condemn the recreational use of marijuana. We believe that marijuana, like many other controlled substances, has legitimate medical purposes. A state’s decision to legalize a drug with known harmful side effects because it benefits the ill is qualitatively different from a decision to legalize the drug for recreational use. As one commentator has observed: “Those who would use marijuana for treatment for nausea and vomiting resulting from chemotherapy treatments or for combating the wasting associated with AIDS . . . cannot be considered marijuana abusers.” James D. Abrams, Note, *A Missed Opportunity: Medical Use of Marijuana Is Legally Defensible*, 31 CAP. U. L. REV. 883, 909 (2003). We agree. But if Colorado legalized Vicodin for recreational purposes and licensed dispensaries in all corners of the state to sell the drug, this would almost certainly create a transboundary nuisance. The fact that all fifty states (and federal law) permit medicinal use of the drug would not undermine the conclusion that a vast majority of jurisdictions would consider a recreational Vicodin market a nuisance.

²⁷⁸ Colorado has enjoyed a boom in “marijuana tourism.” Hughes, *supra* note 205. It should be noted that Colorado has enjoyed a surge in marijuana-seeking visitors, despite the fact that visitors who lack access to a private home have few places to smoke marijuana in Colorado, as the state bans public cannabis consumption and most hotels prohibit smoking marijuana on their premises. Jordan Schrader, *Law Has Barrier to Pot Tourism*, NEWS TRIB. (Mar. 16, 2014), <http://www.thenewtribune.com/2014/03/16/3098052/law-has-barrier-to-pot-tourism.html> [<http://perma.cc/RVK5-NWLZ>].

II. COLORADO'S MARIJUANA-LEGALIZATION EXPERIMENT CONSTITUTES A TRANSBOUNDARY NUISANCE UNDER FEDERAL COMMON LAW

Although federal courts “are not general common-law courts and do not possess a general power to develop and apply their own rules of decision,” the Constitution charges Article III courts with “develop[ing] federal common law” to govern “when there exists a ‘significant conflict between some federal policy or interest and the use of state law.’”²⁷⁹ It is well-settled that transboundary nuisances fall within this field.²⁸⁰

The Supreme Court has promulgated a body of nuisance law regulating “activity harmful to . . . citizens’ health and welfare” which produce effects that cross state lines.²⁸¹ “The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant.”²⁸² This body of law closely tracks the common law of public nuisance applied by most state courts.²⁸³

The *Restatement of Torts* defines public nuisance as “an unreasonable interference with a right common to the general public.”²⁸⁴ By facilitating

²⁷⁹ *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 312–13 (1981) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

²⁸⁰ *E.g.*, *Vermont v. New York*, 417 U.S. 270, 271–72 (1974) (accusing a New York paper mill of polluting Lake Champlain); *New Jersey v. City of New York (New Jersey II)*, 283 U.S. 473, 476–77 (1931) (seeking to enjoin off-shore garbage dumping by New York that caused trash to wash ashore on New Jersey beaches); *New York v. New Jersey*, 249 U.S. 202, 202–03 (1919) (seeking to enjoin New Jersey’s discharge of sewage into New York Harbor); *Georgia v. Tenn. Copper Co. (Tennessee Copper I)*, 206 U.S. 230, 238–39 (1907) (alleging poisonous gas emanating from a Tennessee plant caused damage in Georgia); *Missouri v. Illinois (Missouri I)*, 180 U.S. 208, 208–09 (1901) (alleging Illinois’s discharge of untreated sewage into the Mississippi River polluted drinking water in Missouri).

²⁸¹ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2536 (2011).

²⁸² *Michigan v. U.S. Army Corps of Eng’rs*, 667 F.3d 765, 781 (7th Cir. 2011) (quoting *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979), *vacated*, 451 U.S. 304).

²⁸³ *See, e.g.*, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2011); *Army Corps of Eng’rs*, 667 F.3d at 781; *Nat’l Sea Clammers Ass’n v. City of New York*, 616 F.2d 1222, 1235 (3d Cir. 1980), *vacated on other grounds sub nom. Middlesex Cty. Sewage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981). As stated by the Seventh Circuit:

Public nuisance traditionally has been understood to cover a tremendous range of subjects[,] . . . “includ[ing] interferences with . . . public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, [or] unlicensed prize fights . . . [and interferences] with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable”

U.S. Army Corps of Eng’rs, 667 F.3d at 771–72 (quoting PROSSER & KEETON, *supra* note 102, at 643–45).

²⁸⁴ RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

the introduction of a widely forbidden controlled substance²⁸⁵ into interstate commerce, Colorado is committing a quintessential public nuisance as contemplated by the criteria discussed above.

A. Congress Has Established That Colorado's Recreational Marijuana Market Constitutes an Interstate Nuisance

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' . . . There is general agreement that it is incapable of any exact or comprehensive definition."²⁸⁶ Consequently, the Supreme Court historically relied on "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence" to formulate this body of law.²⁸⁷ But "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual lawmaking by federal courts disappears."²⁸⁸ Thus, "new federal laws . . . may in time preempt the field of federal common law of nuisance."²⁸⁹

As noted above, the bulk of the Supreme Court's transboundary nuisance jurisprudence consists of air²⁹⁰ and water pollution cases.²⁹¹ By establishing uniform national air and water quality standards in the Clean Air and Water Acts, Congress preempted the federal common law of nuisance in these areas, relieving the Court of its historic role of determining what amount of air and water pollution is acceptable.²⁹² More importantly, these

²⁸⁵ 21 U.S.C. § 812(c) (2012) (listing marijuana as a "Schedule One" controlled substance); EDWARD M. BRECHER, LICIT AND ILLICIT DRUGS 413 (1972) ("By 1937, forty-six of the forty-eight states . . . had laws against marijuana.").

²⁸⁶ PROSSER & KEETON, *supra* note 102, at 616.

²⁸⁷ *Milwaukee II*, 451 U.S. at 317.

²⁸⁸ *Id.* at 314.

²⁸⁹ *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 107 (1972). The "displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *Am. Elec. Power Co.*, 131 S. Ct. at 2537 (quoting *Milwaukee II*, 451 U.S. at 317); *see also* Peter Augustine Kraus, *A Federal Preemption of State Tort Law Claims in Nuclear Industry: English v. General Electric Co.*, 33 B.C. L. REV. 468, 469 (1992) ("When the question of preemption involves areas of law customarily occupied by the states, congressional intent to occupy the field exclusively must be 'clear and manifest.'" (quoting *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990))).

²⁹⁰ *E.g.*, *Tennessee Copper I*, 206 U.S. at 238-39; *see also* *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1965 (1938) (holding that Canada was responsible for the air pollution caused by the Trail Smelter Company).

²⁹¹ *See* Percival, *supra* note 46, at 717 (asserting that "the federal common law of interstate nuisance" met "its ultimate demise following the enactment of the Clean Water Act").

²⁹² *Am. Elec. Power Co.*, 131 S. Ct. at 2536 (holding that the Clean Air Act preempts federal common law of nuisance with regard to interstate air pollution); *Milwaukee II*, 451 U.S. at 314 (holding that the Clean Water Act preempts federal common law of nuisance with regard to pollution of interstate bodies of water).

Acts divested the Court of jurisdiction over such matters, assigning primary responsibility for adjudicating interstate pollution disputes to the EPA.²⁹³ As the Court explained, the EPA, as “an expert agency, . . . is surely better equipped” to apply the uniform standards created by the Clean Air and Water Acts because “judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.”²⁹⁴

A nuisance suit challenging Colorado’s marijuana-legalization experiment would confront the Court with a first of its kind, hybrid statutory-common law problem. All of the Court’s original jurisdiction opinions to date involved situations in which the question of federal preemption presented an all-or-nothing proposition. Congress had either left the matter entirely to the courts or had “completely occupied”²⁹⁵ the relevant field by statute.²⁹⁶ In contrast, an original action challenging Colorado’s pot market involves the application of both federal common law and statutory law.

Some commentators contend that “the CSA must displace [claims] involving marijuana” just as the Clean Air Act “displaces . . . claims over emissions.”²⁹⁷ This is not so. States owe “an affirmative duty”²⁹⁸ to protect their neighbors “against injurious acts by individuals from within [their] jurisdiction.”²⁹⁹ And the Constitution does not leave states dependent upon the whims of federal agents to protect them from incursions by sister states. Aggrieved states are constitutionally entitled to present such claims to an impartial forum.³⁰⁰ The Court concluded that the Clean Air and Water Acts displaced federal common law only because “[t]he statutory scheme established by Congress provides a forum for the pursuit of [pollution] claims

²⁹³ *Am. Elec. Power Co.*, 131 S. Ct. at 2539; *Milwaukee II*, 451 U.S. at 320.

²⁹⁴ *Am. Elec. Power Co.*, 131 S. Ct. at 2539–40.

²⁹⁵ *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 44 (2007) (Stevens, J., dissenting) (stating that preemption occurs when federal law “so completely occupie[s] a field that it le[aves] no room for additional . . . regulation”).

²⁹⁶ *Compare Milwaukee I*, 406 U.S. at 107 (“It may happen that new federal laws . . . may in time preempt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.”), with *Am. Elec. Power Co.*, 131 S. Ct. at 2537 (“We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”).

²⁹⁷ Adler, *supra* note 161.

²⁹⁸ *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 (1983).

²⁹⁹ *Trail Smelter*, 3 R.I.A.A. at 1963; accord, e.g., *Vermont*, 417 U.S. at 270–71 (finding New York had a constitutional obligation to prevent a privately owned paper mill from polluting an interstate waterway); *Tennessee Copper I*, 206 U.S. at 238 (holding Tennessee had a constitutional obligation to prevent a private copper-smelting business from polluting the air of a neighboring state); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 518–19 (1851) (finding Virginia had a constitutional obligation to prevent a company operating a private toll bridge over the Ohio River from obstructing navigation).

³⁰⁰ *Milwaukee II*, 451 U.S. at 325–26.

before expert agencies.”³⁰¹ Schemes that leave an aggrieved state without “any forum in which to protect its interests” in the absence of “federal common law” will not be construed to displace the federal common law.³⁰²

“When a [s]tate enters the Union, it surrenders certain sovereign prerogatives”—including the ability to employ diplomatic measures to combat transboundary nuisances.³⁰³ The Constitution dictates that “[t]hese sovereign prerogatives are now lodged in the [f]ederal [g]overnment.”³⁰⁴ But the Court has also recognized that it is insufficient to simply entrust federal agents to protect the states’ “quasi-sovereign interests.”³⁰⁵ It is critical that a forum exists—whether the Supreme Court or an expert agency—where a state can seek redress for grievances with its neighbors.³⁰⁶

Unlike air and water pollution cases, Congress has not divested the Supreme Court of jurisdiction over marijuana-related disputes by “provid[ing] a forum for the pursuit of . . . claims”³⁰⁷ before an “expert agency.”³⁰⁸ But Congress also has not left the question of whether facilitating an intrastate pot market constitutes an interstate nuisance to the “vague and indeterminate nuisance concepts and maxims of equity jurisprudence.”³⁰⁹ Congressional findings definitively answer an interstate-nuisance question when Congress “speak[s] directly to [the] question” at issue.³¹⁰ In the instant case, Congress has spoken directly to that question by concluding that the introduction of marijuana—even in an intrastate market—constitutes an interstate nuisance as the federal common law contemplates that term.³¹¹

The CSA criminalizes the cultivation, possession, or sale of any quantity of marijuana.³¹² The statute also contains several important findings of fact concerning the effect of marijuana on public health and its propensity to be drawn into the stream of interstate commerce.

³⁰¹ *Id.* at 326; *accord Am. Elec. Power Co.*, 131 S. Ct. at 2539.

³⁰² *Milwaukee II*, 451 U.S. at 325–26 (citing *Milwaukee I*, 406 U.S. at 104, 107).

³⁰³ *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 519 (2007).

³⁰⁴ *Id.*

³⁰⁵ *Milwaukee II*, 451 U.S. at 336 (quoting *Tennessee Copper I*, 206 U.S. at 237); *see also Milwaukee I*, 406 U.S. at 104.

³⁰⁶ *See Massachusetts*, 549 U.S. at 518–19 (citing *Tennessee Copper I*, 206 U.S. at 237).

³⁰⁷ *Milwaukee II*, 451 U.S. at 326.

³⁰⁸ *See Am. Elec. Power Co.*, 131 S. Ct. at 2539.

³⁰⁹ *See Milwaukee II*, 451 U.S. at 317.

³¹⁰ *Am. Elec. Power Co.*, 131 S. Ct. at 2537 (alterations in original) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

³¹¹ *See* 21 U.S.C. § 801(2) (2012) (stating that the “importation, manufacture, distribution, and possession” of marijuana has “a substantial and detrimental effect on the health and general welfare of the American people”); *id.* § 801(3)–(4) (finding that marijuana “distributed locally usually ha[s] been transported in interstate commerce immediately before [its] distribution,” and that the intrastate “distribution and possession of” marijuana “contribute[s] to swelling the interstate traffic in such substances”).

³¹² 21 U.S.C. § 812(c).

The *Restatement of Torts* defines public nuisance as “an unreasonable interference with a right common to the general public.”³¹³ Factors applicable to the determination of whether particular conduct constitutes such interference include:

- (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.³¹⁴

Congress’s findings with respect to marijuana “speak[] directly” to each of these factors.³¹⁵

First, Congress’s findings demonstrate that Colorado’s recreational marijuana market significantly interferes with the public health of neighboring states. Congress has expressly found that the “importation, manufacture, distribution, and possession” of marijuana has “*a substantial and detrimental effect on the health and general welfare of the American people.*”³¹⁶ This effect extends well beyond Colorado’s borders. Congress concluded that marijuana “distributed locally usually ha[s] been transported in interstate commerce immediately before [its] distribution,” and that the intrastate “distribution and possession of” marijuana “contribute[s] to swelling the interstate traffic in such substances.”³¹⁷

In 2005, the Supreme Court affirmed these findings in *Gonzales v. Raich*.³¹⁸ As Justice Scalia explained in that case, pot is a “fungible commodit[y]” and as such, marijuana that enters commerce in an intrastate market “is never more than an instant from the interstate market—and this is so whether or not the possession is for . . . lawful use under the laws of a particular [s]tate.”³¹⁹ This interstate effect derives from pot’s “high demand”—and high street value.³²⁰ The drug is the most lucrative commercial crop in the United States.³²¹ This guarantees that “the high demand in the interstate market will draw marijuana” acquired intrastate “into that market” and will

³¹³ RESTATEMENT (SECOND) OF TORTS § 821B.

³¹⁴ *Id.*

³¹⁵ See *Am. Elec. Power Co.*, 131 S. Ct. at 2537 (quoting *Mobil Oil Corp.*, 436 U.S. at 625).

³¹⁶ 21 U.S.C. § 801(2) (emphasis added); see also *id.* § 812 (categorizing marijuana as a “Schedule 1” controlled substance).

³¹⁷ *Id.* § 801(3)–(4).

³¹⁸ See *Gonzales v. Raich*, 545 U.S. 1, 19 (2005).

³¹⁹ *Id.* at 40 (Scalia, J., concurring).

³²⁰ *Id.* at 19 (majority opinion).

³²¹ Venkataraman, *supra* note 55.

thereby have “a substantial effect on supply and demand in the national market for that commodity.”³²² The CSA thus establishes that Colorado’s pot market constitutes a significant health threat to neighboring states.

Second, the commercial (and noncommercial) exploitation of marijuana is proscribed by statute. The CSA criminalizes the cultivation, possession, or sale of any quantity of marijuana.³²³ *Raich* upheld this law against a challenge that it infringed upon state sovereignty.³²⁴ The Court even found that the law validly proscribed the state-sanctioned, noncommercial cultivation of six marijuana plants in a private garden for personal consumption.³²⁵ In contrast to *Raich*’s tiny, private, non-commercial garden, Colorado’s wide-open commercial pot market is a multi-billion dollar industry—likely “the fastest-growing industry in America.”³²⁶ Accordingly, it easily falls within the valid reach of the CSA and demonstrates that the sale of marijuana is proscribed by statute, notwithstanding local law.

Third, Colorado’s recreational marijuana market is both continuous and producing long-lasting harms. Colorado’s experiment does not come with a sunset provision.³²⁷ It is intended to continue unabated into the future. The program is enshrined in the State’s Constitution.³²⁸ Moreover, Big Cannabis is quickly establishing itself as the state’s most powerful commercial interest.³²⁹ The market’s intended permanent nature establishes that it will produce long-term harms. Until it is abated, Colorado pot will, in Congress’s judgment, continue to “have a substantial and detrimental effect on the health and general welfare of . . . people” of neighboring states.³³⁰

Finally, the record demonstrates that Colorado is aware of the effects that its recreational marijuana market is having on its neighbors.³³¹ The Task Force charged with implementing Colorado’s program acknowledged

³²² *Raich*, 545 U.S. at 19.

³²³ 21 U.S.C. § 812(c); 21 U.S.C. § 841 (2012).

³²⁴ *Raich*, 545 U.S. at 41 (Scalia, J., concurring).

³²⁵ *Id.* at 7 (majority opinion).

³²⁶ Sandra Fish, *Legal Marijuana, a Multi-Billion-Dollar Industry, Still Faces Legal Hurdles*, AL JAZEERA AM. (June 11, 2014), <http://america.aljazeera.com/articles/2014/6/11/marijuana-industry-growing.html> [<http://perma.cc/G6UJ-FT7W>].

³²⁷ A sunset provision is a clause in a statute dictating that it “automatically terminates at the end of a fixed period unless it is formally renewed.” *Sunset Law*, BLACK’S LAW DICTIONARY, *supra* note 25.

³²⁸ COLO. CONST. art. XVIII, § 16.

³²⁹ Fish, *supra* note 326; *see also* Carroll, *supra* note 6.

³³⁰ *See* 21 U.S.C. § 801(2).

³³¹ The officials charged with defending Colorado’s regime openly acknowledge the extraterritorial costs of the state’s venture. John Suthers, the State’s Attorney General from 2005 to 2015, asserted that it is “clear that . . . Colorado is becoming a significant exporter of marijuana to the rest of the country.” Coffman, *supra* note 207. Suthers’s successor agreed with his assessment, admitting that “[i]llegal drug dealers are simply hiding in plain sight, attempting to use [Colorado’s] legalized market as cover.” Coffman, *supra* note 208.

that “[a]dditional actions” are necessary “to limit diversion out of Colorado.”³³² But short of suggesting signage advising buyers not to take marijuana out of the state, the Task Force has provided no guidance regarding how to accomplish this goal.³³³ Thus, Colorado is on notice that its program is harming its neighbors.

Congress has spoken directly to the dispositive question presented here by making factual findings concerning intrastate marijuana markets that correspond to every facet of the common-law’s definition of public nuisance. As such, it has answered the question of whether Colorado’s experiment constitutes an interstate nuisance.

B. Even in the Absence of the CSA’s Findings, Colorado’s Marijuana-Legalization Experiment Constitutes an Interstate Nuisance Under Federal Common Law

The federal common law of nuisance is essentially a repository of common law public nuisance concepts with which a majority of jurisdictions find common ground.³³⁴ One commentator has dismissed the externalities associated with Colorado’s marijuana trade as “weak gruel as far as nuisance claims go.”³³⁵ But few legal concepts are more universally accepted than the principle that allowing one’s territory to serve as a location from which illicit drugs are introduced into surrounding communities constitutes a quintessential public nuisance.³³⁶ State and federal reporters are replete

³³² TASK FORCE REPORT, *supra* note 209, at 50.

³³³ *See id.*

³³⁴ *E.g.*, *Kivalina*, 696 F.3d at 855 (adopting the definition of public nuisance found in the *Restatement (Second) of Torts*); *Army Corps of Eng’rs*, 667 F.3d at 781 (using the *Restatement (Second) of Torts* to define public nuisance); *Nat’l Sea Clammers Ass’n*, 616 F.2d at 1235 (holding defendant liable for public nuisance based on the *Restatement’s* definition of public nuisance).

³³⁵ Adler, *supra* note 161.

³³⁶ *E.g.*, *United States v. Urserly*, 518 U.S. 267, 290–91 (1996) (noting that in many circumstances forfeiture of property used to commit a federal drug felony may abate a nuisance); *United States v. Abdullah*, 903 F. Supp. 913, 918 (D. Md. 1995) (applying an enhanced penalty based on defendant’s prior conviction for maintaining a drug house that constituted a common nuisance); *Gonzalez v. State*, 134 So. 3d 350, 354 (Miss. Ct. App. 2013) (discussing defendant’s prior conviction for visiting or maintaining a common nuisance in the form of a drug house); *Olson v. State*, 56 A.3d 576, 611 (Md. Ct. Spec. App. 2012) (recognizing a statute “criminalizing the maintenance of a common nuisance in the form of a drug house”); *State v. Curtis*, 2005 Ohio 604, 604 (Ct. App. 2005) (asserting that a police officer had sufficient suspicion to detain defendant based on facts that included a prior “use nuisance” order relating to drug activities in the defendant’s residence); *Lewis v. City of University City*, 145 S.W.3d 25, 35 (Mo. Ct. App. 2004) (recognizing University City’s interest in abating an ongoing nuisance by not allowing drug homes); *City of Miami v. Keshbro*, 717 So. 2d 601, 605 (Fla. Ct. App. 1998) (considering the operation of a drug house as a nuisance and thus not part of the property owner’s bundle of rights); *City of Milwaukee v. Arrieh*, 565 N.W.2d 291, 292 (Wis. Ct. App. 1997) (applying Wisconsin law that declares a nuisance to be “any building or structure that is used to facilitate the delivery, distribution or manufacture of a controlled substance and any building or structure where those acts take

with opinions abating such nuisances.³³⁷ Many even allowed the government to take title to offending property from landholders permitting such activities.³³⁸

These opinions rest on sound judgment. While the popular culture frequently portrays pot as “a harmless diversion,”³³⁹ scientific studies reveal that the truth is far more nuanced. A recent study published in the *New England Journal of Medicine* concluded that marijuana use causes “long-lasting changes in brain function that can jeopardize educational, professional and social achievements.”³⁴⁰ Moreover, contrary to popular claims that pot is not addictive,³⁴¹ “the evidence clearly indicates that long-term marijuana use can lead to addiction.”³⁴² There is widespread scientific recognition “of a bona fide cannabis withdrawal syndrome”—symptoms of which include “irritability, sleeping difficulties, dysphoria, craving, and anxiety” and “which makes cessation difficult and contributes to relapse.”³⁴³ This addictive hold is particularly strong on users under twenty-five.³⁴⁴ Half of pa-

place”); *Lew v. Superior Court*, 25 Cal. Rptr. 2d 42, 44–45 (Ct. App. 1993) (considering it a well-accepted fact that in California a drug house is a nuisance); *People v. Griffin*, 633 N.E.2d 773, 775 (Ill. App. Ct. 1993) (affirming an injunction against a defendant when illegal drug transactions occurred in the defendant’s building). Famously liberal San Francisco recently brought a nuisance suit against a McDonald’s in the city’s Haight-Ashbury neighborhood because the restaurant allegedly is the site of illicit drug transactions, including marijuana sales. Emily Green, *McDonald’s on Haight Street Is a Magnet for Homeless Youth, Drugs*, S.F. CHRON. (May 13, 2015), <http://www.sfchronicle.com/bayarea/article/McDonald-s-on-Haight-Street-is-a-magnet-for-6262459.php> [<http://perma.cc/LF8L-XJ65>] (reporting on a nuisance action filed against a McDonald’s where illicit drug transactions occurred).

³³⁷ See *supra* note 336 and accompanying text (collecting examples).

³³⁸ See, e.g., *Ursery*, 518 U.S. at 290–91.

³³⁹ Jesse Singal, *In ‘Marijuana Legalization,’ Hard Truths for All Sides of the Debate*, DAILY BEAST (July 22, 2012), <http://www.thedailybeast.com/articles/2012/07/22/in-marijuana-legalization-hard-truths-for-all-sides-of-the-debate.html> [<http://perma.cc/E8EM-X8T7>].

³⁴⁰ Volkow et al., *supra* note 64, at 2225.

³⁴¹ See Rochelle Koff, *John Morgan Says ‘Nobody’s Addicted’ to Marijuana*, POLITIFACT FLA. (Sept. 22, 2013), <http://www.politifact.com/florida/statements/2013/oct/08/john-morgan/john-morgan-says-nobodys-addicted-marijuana/> [<http://perma.cc/FU4L-DCE7>]; see also Mauer, *supra* note 5, at 701 (noting that “we have marijuana being celebrated in popular culture”).

³⁴² Volkow et al., *supra* note 64, at 2219 (citing C. Lopez-Quintero et al., *Probability and Predictors of Transition from First Use to Dependence on Nicotine, Alcohol, Cannabis, and Cocaine: Results of the National Epidemiologic Survey on Alcohol and Related Conditions*, 115 NAT’L EPIDEMIOLOGIC SURVEY ON ALCOHOL & RELATED CONDITIONS 120, 120–30 (2011)); accord Chris Roberts, *Hooked on Legalization: Marijuana Is Addictive, Whether Legalization Backers Admit It or Not*, S.F. WEEKLY (July 23, 2014), <http://www.sfweekly.com/sanfrancisco/hooked-on-legalization-marijuana-is-addictive-whether-legalization-backers-admit-it-or-not/Content?oid=2989017> [<http://perma.cc/U92A-9P94>].

³⁴³ Volkow et al., *supra* note 64, at 2219; accord Alan J. Budney et al., *Marijuana Dependence and Its Treatment*, 4 ADDICTION SCI. & CLINICAL PRAC. 4, 10 (2007).

³⁴⁴ Budney et al., *supra* note 343, at 4.

tients who seek treatment for marijuana addiction are under twenty-five years of age.³⁴⁵

Pot's addictive properties come at a high price for both users and for society at large. Imaging studies of regular pot users' brains reveal "decreased activity in prefrontal regions and reduced volumes in the hippocampus."³⁴⁶ This damage results in "impaired neural connectivity . . . in specific regions of the brain"—particularly those responsible for "learning and memory" and "self-conscious awareness."³⁴⁷ Such brain damage manifests itself in reduced cognitive function, "impairments in memory and attention," and "significant declines in IQ."³⁴⁸ Those who become dependent on marijuana as adolescents can lose up to eight IQ points by the time they reach adulthood.³⁴⁹ These "long-lasting changes in brain function . . . jeopardize education, professional, and social achievements," yielding predictable negative social consequences.³⁵⁰ "A clear association between cannabis use and the development of psychotic disorders has been repeatedly demonstrated."³⁵¹ And "[y]oung people who have dropped out of school . . . have particularly high rates of frequent marijuana use."³⁵² These externalities directly correlate to what many consider "the defining challenge of our time"—income inequality.³⁵³ Studies reveal that frequent marijuana use leads to "lower income, greater need for socioeconomic assistance, unemployment, criminal behavior, and lower satisfaction with life."³⁵⁴

In the United States, "cannabis dependence is twice as prevalent as dependence on any other illicit psychoactive substance."³⁵⁵ Accordingly, its negative social impact dwarfs those of other illicit controlled substances.³⁵⁶

³⁴⁵ *Id.*

³⁴⁶ Volkow et al., *supra* note 64, at 2220.

³⁴⁷ *Id.*

³⁴⁸ *Id.*; accord LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2, *supra* note 195, at 36.

³⁴⁹ LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 2, *supra* note 195, at 36.

³⁵⁰ Volkow et al., *supra* note 64, at 2225; accord Budney et al., *supra* note 343, at 4.

³⁵¹ Alan J. Budney & Catherine Stanger, *Cannabis Use and Misuse*, in IACAPAP E-TEXTBOOK OF CHILD AND ADOLESCENT MENTAL HEALTH ch. G.2, at 8 (Joseph M. Rey ed., 2012); accord Volkow et al., *supra* note 64, at 2221 ("Regular marijuana use is associated with an increased risk of anxiety and depression." (citing George C. Patton et al., *Cannabis Use and Mental Health in Young People: Cohort Study*, 325 BRIT. MED. J. 1195, 1195–98 (2002))).

³⁵² Volkow et al., *supra* note 64, at 2221.

³⁵³ See Jim Kuhnhehn, *Obama: Income Inequality Is 'Defining Challenge of Our Time'*, HUFFINGTON POST (Dec. 4, 2013), http://www.huffingtonpost.com/2013/12/04/obama-income-inequality_n_4384843.html [<http://perma.cc/C7EY-KMF6>] (noting President Obama has called income inequality as "the defining challenge of our time").

³⁵⁴ Volkow et al., *supra* note 64, at 2221; accord Budney et al., *supra* note 343, at 4; Budney & Stanger, *supra* note 351, at 8.

³⁵⁵ Budney et al., *supra* note 343, at 5.

³⁵⁶ See Adam Paul Weisman, *I Was a Drug-Hype Junkie: 48 Hours on Crack Street*, NEW REPUBLIC, Oct. 6, 1986, at 14, 16 (stating marijuana is America's most popular illegal drug).

These externalities result not because pot is intrinsically more dangerous than drugs like heroin and cocaine—it is not³⁵⁷—but rather because its “legal status allows for more widespread exposure.”³⁵⁸ The popular culture’s embrace of legalized pot³⁵⁹ may portend a dire forecast. “As policy shifts toward legalization of marijuana, it is reasonable and probably prudent to hypothesize that its use will increase and that, by extension, so will the number of persons for whom there will be negative health consequences.”³⁶⁰ These consequences will be borne by all—users and nonusers alike—in the form of increased social assistance³⁶¹ and higher health insurance premiums.³⁶²

The evidence thus demonstrates both that the marijuana trade qualifies as a nuisance as defined by federal common law—i.e., it is “harmful to . . . citizens’ health and welfare”³⁶³—and that its negative externalities spill over into neighboring states.³⁶⁴

The central tenet of nuisance law is the ancient maxim *sic utere tuo ut alienum non laedas*—“so use your own as not to injure another’s property.”³⁶⁵ This adage is also the rock on which the federal common law of nuisance is built.³⁶⁶ Colorado’s experiment deviates from this covenant. While the state reaps the benefits of its venture—some \$53 million in tax revenue last year³⁶⁷—its windfall is made possible by harm inflicted upon neighboring states which are forced to endure the resulting harmful externalities.³⁶⁸ The norms of public-nuisance law demand that if Colorado is allowed to

³⁵⁷ Budney et al., *supra* note 343, at 5 (providing that “[m]arijuana produces dependence less readily than” heroin and cocaine, but “because so many people use marijuana, cannabis dependence is twice as prevalent as dependence on any other illicit psychoactive substance”).

³⁵⁸ Volkow et al., *supra* note 64, at 2226.

³⁵⁹ Mauer, *supra* note 5, at 701 (stating that “we have marijuana being celebrated in popular culture”).

³⁶⁰ Volkow et al., *supra* note 64, at 2226.

³⁶¹ *See id.* at 2221 (noting a link between marijuana use, unemployment, and “greater need for socioeconomic assistance”).

³⁶² *See* Claire Andre et al., *Voluntary Health Risks: Who Should Pay?*, 6 ISSUES IN ETHICS 1, 1 (1993), available at <http://www.scu.edu/ethics/publications/ie/v6n1/voluntary.html> [<http://perma.cc/V5CV-Z7Y3>] (“[A]t least [twenty-five] cents of every health care dollar is spent on the treatment of diseases or disabilities that result from potentially changeable behaviors.”).

³⁶³ *Am. Elec. Power Co.*, 131 S. Ct. at 2536.

³⁶⁴ LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 186, at 4–5, 38, 52.

³⁶⁵ *Lussier v. San Lorenzo Valley Water Dist.*, 253 Cal. Rptr. 470, 473 (Ct. App. 1988); *Merrill*, *supra* note 27, at 953.

³⁶⁶ *See* *Elwood v. City of New York*, 450 F. Supp. 846, 867 (S.D.N.Y. 1978) (applying the maxim to the federal common law of nuisance); *accord Tennessee Copper I*, 206 U.S. at 238–39; *Merrill*, *supra* note 27, at 953.

³⁶⁷ Katie Lobosco, *Recreational Pot: \$53 Million in Tax Revenue to Colorado*, CNN MONEY (Feb. 12, 2015), <http://money.cnn.com/2015/02/12/news/economy/colorado-marijuana-tax-revenue/> [<http://perma.cc/F4JY-B22S>].

³⁶⁸ LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 186, at 4–5, 38, 52.

continue to enjoy the benefits of its venture, it must share some of this bounty with its neighbors.

III. DAMAGES ARE THE APPROPRIATE REMEDY

Historically, most successful Supreme Court original actions culminated in injunctions abating the nuisance.³⁶⁹ But Colorado's experiment presents a problem never confronted by the Court in an original nuisance action. Colorado law—indeed the State's Constitution—specifically permits the possession and sale of marijuana.³⁷⁰ Effective abatement of the nuisance thus poses three requirements: an amendment to Colorado's Constitution, affirmative legislative changes to its criminal code,³⁷¹ and enforcement of these new statutes by state police officers. None of the prior original jurisdiction cases where the Court issued injunctive relief to abate a nuisance required affirmative legislative action by the defendant-States (much less a constitutional amendment) or implementation of federal mandates by state law enforcement officers.

Rather, in all such prior cases, the Court enforced its judgments directly using its contempt power to “bind the officers, agents, and citizens of the state from engaging in the proscribed conduct.”³⁷² This was possible even in cases involving nuisances committed by private actors because such cases typically involved a small number of offenders who were joined as parties to the suit and were likewise subject to the Court's contempt power.³⁷³

³⁶⁹ See Cheren, *supra* note 34, at 161 (noting that injunctive relief is a common remedy for states prevailing in original actions). The Supreme Court has awarded damages to states in original jurisdiction cases on only five occasions. *E.g.*, *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053–54 (2015) (awarding Kansas \$5.5 million in damages to compensate for water misappropriated by Nebraska from the Republican River); *Kansas v. Colorado*, 543 U.S. 86, 96 (2004) (awarding Kansas \$38 million in damages); *Texas v. New Mexico*, 494 U.S. 111, 111 (1990) (awarding Texas \$14 million in damages); *Virginia v. West Virginia*, 246 U.S. 565, 589 (1918) (awarding Virginia over \$12.3 million, with interest thereon from July 1, 1915, until paid, at the rate of 5% per annum); *South Dakota v. North Carolina*, 192 U.S. 286, 321 (1904) (awarding South Dakota \$27,400 in damages payable on or before the first Monday of January, 1905).

³⁷⁰ COLO. CONST. art. XVIII, § 16.

³⁷¹ See COLO. REV. STAT. § 12-43.4-201 (2013) (authorizing the “cultivation, manufacture, distribution, sale, and testing of retail marijuana and retail marijuana products” if certain conditions are satisfied).

³⁷² See Cheren, *supra* note 34, at 161 (discussing how the Court has used its contempt powers to enforce judgments against recalcitrant states).

³⁷³ See, e.g., *Vermont v. New York*, 417 U.S. 270, 270–71 (1974) (joining a privately owned New York paper mill as a party in an original action between Vermont and New York); *Georgia v. Tenn. Copper Co. (Tennessee Copper II)*, 237 U.S. 474, 475–76 (1915) (joining three private Tennessee copper-smelting businesses as parties in an original action between Georgia and Tennessee); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 518–19 (1851) (joining a private Virginia toll bridge company in an original action between Pennsylvania and Virginia).

In contrast, thousands of individuals and businesses traffic Colorado pot to neighboring states.³⁷⁴ It would be impossible to join all violators as parties. And the Supreme Court Marshal cannot be expected to single-handedly enforce a renewed statewide marijuana ban.³⁷⁵

In our view, the relief sought by Nebraska and Oklahoma—an order effectively compelling the Colorado legislature to amend its laws to prohibit marijuana sales and commanding state agents to enforce such prohibitions—would run afoul of constitutional prohibitions against federal commandeering of the states.³⁷⁶ In contrast, an award of damages designed to compensate neighboring states for losses caused by the influx of Colorado pot entails no constitutional obstacles.³⁷⁷ In advocating this position, we

³⁷⁴ See *supra* note 182 and accompanying text (providing evidence that in the first months of Colorado's experiment, authorities in surrounding states reported a surge in seizures of Colorado marijuana).

³⁷⁵ In 1904 in *South Dakota v. North Carolina*, the Court instructed the Supreme Court Marshal to seize and auction railroad stock owned by North Carolina to satisfy a damages judgment awarded to South Dakota. 192 U.S. at 321–22.

³⁷⁶ *New York v. United States*, 505 U.S. 144, 161 (1992) (stating federal authorities may not simply “commandeer the legislative processes of the [s]tates by directly compelling them to enact . . . a federal regulatory program” (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981))).

³⁷⁷ The Eleventh Amendment denies federal courts the power to award monetary damages in actions “commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. On its face, the Amendment is inapplicable in original actions between states because its text only affords states sovereign immunity in federal-court actions commenced by *citizens*, not *states*. See *id.* But in *Alden v. Maine*, 527 U.S. 706, 713 (1999), the Court averred that “the sovereign immunity of the [s]tates neither derives from, nor is limited by, the terms of the Eleventh Amendment.” Rather, the Court concluded that “the [s]tates’ immunity from suit is a fundamental aspect of the sovereignty which [they] enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention.” *Id.* Notwithstanding *Alden*’s expansion of sovereign immunity, the Court has limited the doctrine to the text of the Eleventh Amendment in original actions. Addressing the issue two years after *Alden*, in *Kansas v. Colorado*, the Court rejected Colorado’s contention that the Constitution immunized it from damages in an original action. *Kansas v. Colorado (Kansas III)*, 533 U.S. 1, 7 (2001) “We have decided that a [s]tate may recover monetary damages from another [s]tate in an original action, without running afoul of the Eleventh Amendment.” *Id.* This is so because “[i]n proper original actions, the Eleventh Amendment is no barrier [to the award of damages], for by its terms, it applies only to suits by citizens against a [s]tate.” *Id.*; accord *Texas v. New Mexico*, 482 U.S. 124, 130 (1987). Although *Kansas v. Colorado* did not specifically address *Alden*’s contention that state sovereign immunity is broader than the text of the Eleventh Amendment, in earlier opinions the Court observed that “[b]y ratifying the Constitution, the States gave [the Supreme] Court complete judicial power to adjudicate disputes among [them] . . . and this power includes the capacity to provide one [s]tate a remedy for the breach of another.” *Texas*, 482 U.S. at 128. Thus, the states waived their sovereign immunity to suits by sister states “by their own consent and delegated authority” to the Supreme Court “as a necessary feature of the formation of a more perfect Union.” *Monaco v. Mississippi*, 292 U.S. 313, 328–29 (1934). The *Kansas* Court’s categorical rejection of the argument that states do not enjoy sovereign immunity in original actions, coming as it did on the heels of *Alden*, constitutes an implicit reaffirmation of its prior holdings that the states’ pre-constitutional immunity in such

posit that the Court should look to the Coase Theorem—a principle designed to efficiently settle disputes involving externalities caused by pollution—to formulate appropriate remedies for states harmed by Colorado’s experiment.

A. The Constitution’s Anti-Commandeering Proscriptions Deny the Court the Power to Compel Colorado to Enact or Enforce Laws Banning the Possession or Sale of Marijuana

Although the federal government “has substantial powers to govern the [n]ation directly . . . the Constitution has never been understood to confer upon Congress the ability to require the [s]tates to govern according to [its] instructions.”³⁷⁸ The “[s]tates are not mere political subdivisions” of the federal government, and “[s]tate governments are neither regional offices nor administrative agencies of the federal government.”³⁷⁹ Thus, federal authorities “may not simply ‘commandee[r] the legislative processes of the [s]tates by directly compelling them to enact . . . a federal regulatory program.’”³⁸⁰ The Constitution likewise denies federal authorities the power to conscript state law enforcement officers by “press[ing] [them] into federal service . . . for the administration of federal programs.”³⁸¹

To date, the Court’s anti-commandeering jurisprudence has all involved *congressional* attempts to conscript state authorities.³⁸² Yet, these same principles necessarily preclude federal *judicial* commandeering of state officials to implement a federal directive. In 2011, the Court implicitly acknowledged such limitations in *Brown v. Plata*.³⁸³ The *Plata* Court wrestled with the question of what remedies were available to prisoners following a judicial finding that overcrowding in California prisons had become so excessive that it violated the Eighth Amendment’s prohibition against cruel and unusual punishments.³⁸⁴

actions has been “altered by the plan of the Convention.” *Alden*, 527 U.S. at 713; see *Kansas III*, 533 U.S. at 7.

³⁷⁸ *New York*, 505 U.S. at 162.

³⁷⁹ *Id.* at 188.

³⁸⁰ *Id.* at 161 (quoting *Hodel*, 452 U.S. at 288).

³⁸¹ *Printz v. United States*, 521 U.S. 898, 905 (1997).

³⁸² The Constitution enables states to form interstate compacts, contracts between sister states with “the Consent of Congress.” U.S. CONST. art. I, § 10, cl. 3. In 1918—more than seven decades before the birth of its anti-commandeering jurisprudence—the Court intimated that the limiting principles articulated by those decisions are inapplicable to congressional acts passed to enforce existing interstate compacts. “[T]he lawful exertion of . . . authority by Congress to compel compliance with [an] obligation resulting from [a] contract between . . . two [s]tates which it approved is not circumscribed by the powers reserved to the [s]tates [by the Tenth Amendment].” *Virginia*, 246 U.S. at 602.

³⁸³ See *Brown v. Plata*, 131 S. Ct. 1910, 1938 (2011).

³⁸⁴ *Id.* at 1928–29.

Plata affirmed a district court order mandating the release of some 37,000 prisoners within two years to reduce the prison population to constitutionally permissible levels.³⁸⁵ The district court recognized that California could “eliminate overcrowding” by simply “build[ing] more prisons,” but implicitly acknowledged that the release order was necessary because commanding state authorities to construct more prisons or expend funds on specific projects are state legislative prerogatives that fall outside the federal judiciary’s power.³⁸⁶ This limitation on federal power is consistent with the anti-commandeering jurisprudence’s recognition that “the Constitution simply does not give Congress”—or Article III courts—the authority to compel states to expend their “resources [to] enforce federal law.”³⁸⁷

Nebraska’s and Oklahoma’s pending suit ignores this limitation. Although claiming that they “are not suggesting the CSA requires Colorado to criminalize marijuana,”³⁸⁸ their complaint—citing “conflicts with the CSA and corresponding federal laws and treaty obligations”³⁸⁹—paradoxically seeks an order compelling Colorado to do just that. They “pray that the State of Colorado . . . [b]e enjoined from any and all application of Sections 16(4) and (5) of Article XVIII of the Colorado Constitution.”³⁹⁰ Section 16(4) dictates that the “[m]anufacture, possession, or purchase of marijuana” by “a person who is twenty-one years of age or older” is “not unlawful and shall not be an offense under Colorado law.”³⁹¹ Section 16(5) prohibits the prosecution of marijuana *sellers* so long as they demonstrate compliance with requirements concerning “[s]ecurity . . . for marijuana establishments,”³⁹² the prevention of “diversion . . . to persons under the age of twenty-one,”³⁹³ and “[l]abeling . . . [of] products.”³⁹⁴ The sale of marijuana by those who do not comply with these requirements remains a crime under Colorado law.³⁹⁵

As Professor Michael Dorf explained, “[t]he Colorado laws purporting to ‘legalize’ marijuana in fact do no such thing.”³⁹⁶ They simply “modify state laws that previously prohibited marijuana, so that now people who comply with the state’s regulatory requirements will not be subject to state

³⁸⁵ *Id.* at 1923.

³⁸⁶ See *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 951 (E.D. Cal. 2009).

³⁸⁷ *Alden*, 527 U.S. at 801 n.34; *New York*, 505 U.S. at 178.

³⁸⁸ Opening Brief, *supra* note 9, at 15.

³⁸⁹ Complaint, *supra* note 9, at 28.

³⁹⁰ *Id.* at 28–29.

³⁹¹ COLO. CONST. art. XVIII, § 16(4).

³⁹² *Id.* § 16(5)(a)(IV).

³⁹³ *Id.* § 16(5)(a)(V).

³⁹⁴ *Id.* § 16(5)(a)(VI).

³⁹⁵ COLO. REV. STAT. § 39-28.8-306 (2013).

³⁹⁶ Dorf, *supra* note 213.

prosecution for marijuana cultivation, distribution, or possession.”³⁹⁷ Enjoining these provisions would restore the full-scale criminalization of marijuana that existed before Colorado amended its Constitution.

Nebraska and Oklahoma ultimately make no bones about the true aim of their suit. They explicitly ask the Court to restore “the status quo ante”—i.e., “the situation that existed before.”³⁹⁸ Colorado decriminalized recreational marijuana.³⁹⁹ Such relief is necessary, they contend, to prevent Colorado from “roguishly . . . dismantling” the CSA.⁴⁰⁰ But the anti-commandeering jurisprudence unequivocally recognizes that federal authorities “may not . . . ‘commandeer the legislative processes of the [s]tates by directly compelling them to enact and enforce a federal regulatory program.’”⁴⁰¹

Some commentators assert that the anti-commandeering doctrine endows Colorado’s marijuana regime with complete immunity from transboundary nuisance suits.⁴⁰² Commenting on an earlier draft of this Article, Professor Dorf predicted that a damages action may also “founder on the anti-commandeering principle” because “holding a state liable for failing to enact or enforce federal law seems tantamount to obliging the state to enact or enforce federal law.”⁴⁰³ We respectfully contend that Professor Dorf’s prediction misapprehends the ultimate source of the proscriptions identified by the Court in its transboundary nuisance cases.

The Court’s anti-commandeering opinions involve situations where Congress—relying on its power to regulate interstate commerce and nothing more—conscripted state agents into the federal bureaucracy.⁴⁰⁴ In contrast, the states’ obligation not to subject their neighbors to transboundary nuisances stems from *the Constitution* itself. “When the states by their union made the forcible abatement of . . . nuisances” committed by sister states “impossible to each, they did not thereby agree to submit to whatever might be done.”⁴⁰⁵ Thus, the Constitution imposes “an affirmative duty” on

³⁹⁷ *Id.*; see also Chemerinsky et al., *supra* note 4, at 103 (“The federal government cannot command any state government to criminalize marijuana conduct under state law [I]f states wish to repeal existing marijuana laws or partially repeal those laws, they may do so without running afoul of federal preemption.”).

³⁹⁸ Reply Brief, *supra* note 9, at 5.

³⁹⁹ *Status Quo Ante*, BLACK’S LAW DICTIONARY, *supra* note 25.

⁴⁰⁰ Reply Brief, *supra* note 9, at 2.

⁴⁰¹ *New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288).

⁴⁰² See Barnett, *supra* note 213; Dorf, *supra* note 213; Somin, *supra* note 254; Eugene Volokh, *Some Small Observations About the New Nebraska & Oklahoma v. Colorado Interstate Marijuana Lawsuit*, VOLOKH CONSPIRACY (Dec. 18, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/18/some-small-observations-about-the-new-nebraska-oklahoma-v-colorado-interstate-medical-marijuana-lawsuit/> [http://perma.cc/6S8X-NLUL].

⁴⁰³ Dorf, *supra* note 213.

⁴⁰⁴ See *Printz*, 521 U.S. at 905; *New York*, 505 U.S. at 161.

⁴⁰⁵ *Georgia v. Tenn. Copper Co. (Tennessee Copper I)*, 206 U.S. 230, 237 (1907).

every state to protect its neighbors from harm emanating from its territory.⁴⁰⁶ This includes “a duty to protect other [s]tates against injurious acts by individuals from within its jurisdiction.”⁴⁰⁷

The imposition of this duty does not offend the anti-commandeering principle because it stems from the Constitution. “Constitutional provisions that impose affirmative duties on the [s]tates are hardly inconsistent with the notion of reserved powers.”⁴⁰⁸ Hence, a judgment against Colorado impugning its commercial pot market because it creates a transboundary nuisance would not run afoul of any constitutional prohibition. An obligation imposed by *the Constitution* cannot be unconstitutional.⁴⁰⁹

The notion that Colorado’s experiment violates a constitutional obligation will strike some as counterintuitive. Congress, after all, determined that intrastate marijuana markets constitute a transboundary nuisance.⁴¹⁰ But the Constitution invests the Supreme Court and Congress with the “sovereign prerogative[]” to promulgate standards resolving nuisance disputes between states.⁴¹¹

In 1907, in *Georgia v. Tennessee Copper*, the Supreme Court concluded that by permitting its citizens to release noxious gases into Georgia, Tennessee violated its constitutional obligation not to commit transboundary nuisances.⁴¹² Today, Tennessee’s offending emissions would constitute an

⁴⁰⁶ *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 (1983).

⁴⁰⁷ *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1963 (1938) (citing *EAGLETON*, *supra* note 163, at 80); *accord Vermont*, 417 U.S. at 270–71 (holding New York had a constitutional obligation to prevent a privately owned paper mill from polluting an interstate waterway); *Tennessee Copper I*, 206 U.S. at 238 (holding Tennessee had a constitutional obligation to prevent a private copper-smelting business from polluting the air of a neighboring state); *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 518–19 (holding Virginia had a constitutional obligation to prevent a company operating a private toll bridge over the Ohio River from obstructing navigation).

⁴⁰⁸ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 863 (1995) (Thomas, J., dissenting).

⁴⁰⁹ The Court’s anti-commandeering opinions make clear that its proscriptions do not prevent it from impugning interstate nuisances. In *Printz v. United States*, 521 U.S. at 905, its most comprehensive anti-commandeering decision, the Court noted that the “compelled enlistment” of state authorities “for the administration of federal programs is, until very recent years at least, unprecedented.” In contrast, the Court’s original nuisance cases date back to 1851. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 518. *Printz*’s observation demonstrates that the anti-commandeering prohibition does not extend to original nuisance actions—such suits are not “unprecedented.” See *Printz*, 521 U.S. at 905.

⁴¹⁰ See 21 U.S.C. § 801(2) (2012) (finding that the “importation, manufacture, distribution, and possession” of marijuana has “a substantial and detrimental effect on the health and general welfare of the American people”); *id.* § 801(3)–(4) (finding that marijuana “distributed locally usually ha[s] been transported in interstate commerce immediately before [its] distribution,” and that the intrastate “distribution and possession of” marijuana “contribute[s] to swelling the interstate traffic in such substances”).

⁴¹¹ *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 519 (2007).

⁴¹² *Tennessee Copper I*, 206 U.S. at 236–37.

interstate nuisance per se because they would violate the Clean Air Act.⁴¹³ The fact that Congress has enacted legislation categorizing the conduct as a transboundary nuisance would not undermine the Court's conclusion. The Constitution entrusts the Supreme Court to promulgate common law nuisance rules to resolve the "bickerings and animosities" that will inevitably "spring up among the members of the Union."⁴¹⁴ And Congress has the power to preempt "question[s] previously governed by a decision rested on [the] federal common law."⁴¹⁵ Thus, Congress's conclusion that the conduct at issue constitutes an interstate nuisance does not undermine the Court's holding that Tennessee violated its constitutional duty. It confirms it.

Similarly, by determining that Colorado's pot market constitutes an interstate nuisance, Congress preempted a "question" that would otherwise be "governed by . . . federal common law," categorizing the conduct at issue a transboundary nuisance in violation of the Constitution.⁴¹⁶

Nonetheless, as *Plata* demonstrates, even when the Constitution itself imposes obligations upon states, the anti-commandeering doctrine limits the remedies federal courts can provide. When states fail to fulfill their obligations, federal courts can provide relief to injured parties—but only relief that they can enforce directly using their own resources.⁴¹⁷ They cannot "press [a state's police] into federal service."⁴¹⁸ Thus, in an original action, the Supreme Court can only prescribe remedies that it can *directly* enforce utilizing its own resources.⁴¹⁹ The Supreme Court lacks the resources to directly en-

⁴¹³ Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535–36 (2011). Similarly, whether Illinois's discharge of sewage into the Mississippi River, as at issue in *Missouri v. Illinois* (*Missouri II*), 200 U.S. 496, 521 (1906), constituted a transboundary nuisance would now turn upon whether the discharges exceeded the limits prescribed by the Clean Water Act. See *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 317 (1981).

⁴¹⁴ THE FEDERALIST, *supra* note 93, at 478.

⁴¹⁵ *Milwaukee II*, 451 U.S. at 314.

⁴¹⁶ See *id.* We posit that congressional mandates designed to mediate interstate nuisance disputes that would otherwise be governed by the federal common law are different in character than other mandates based on Article I powers. This is particularly so when the mandate at issue is invoked by a sister state in an interstate dispute, rather than by federal authorities.

⁴¹⁷ For example, when a state successfully prevails in a transboundary nuisance action before the EPA, the judgment is enforced by obtaining a federal court order imposing fines "to induce [defendants] to comply with injunctions or other judicial orders designed to modify behavior." U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 613 (1992).

⁴¹⁸ *Printz*, 521 U.S. at 905. The separation of powers doctrine similarly dictates that the Court cannot compel the Executive Branch to alleviate the problem by enforcing the CSA. See *supra* note 213 and accompanying text (asserting that Nebraska and Oklahoma have not pled their injuries with the level of particularity required to invoke the Supreme Court's original jurisdiction).

⁴¹⁹ When it has awarded injunctive relief in past original actions, the Court was able to enforce the order directly using its contempt power to "bind the officers, agents, and citizens of the state from engaging in the proscribed conduct." Cheren, *supra* note 34, at 161. Bringing an end to Colorado's commercial pot market will require deploying state law enforcement officers to enforce laws recriminalizing marijuana. The Court lacks the resources to enforce these laws directly.

force an order enjoining thousands of private actors who are not parties to the suit from growing, possessing, or selling marijuana in Colorado.⁴²⁰

But as *Plata* also demonstrates, this limitation does not mean that the Constitution leaves Colorado's sister states with no remedy. In *Plata*, the anti-commandeering doctrine did not bar the Court from entering judgment against California because the prohibition against inflicting "cruel and unusual punishments"—like the affirmative duty to protect neighboring states from transboundary harm—is imposed on the states by the Constitution itself.⁴²¹ Nonetheless, even in such cases the anti-commandeering doctrine limits the remedies the Court can award to those it can enforce directly using its own resources.⁴²² The Court could not simply order California to "build more prisons."⁴²³ Such a command would have required "commandeer[ing] the legislative processes of the [s]tate[]." ⁴²⁴ But this did not prevent the Court from providing a remedy to the victims of the state's unconstitutional conduct. The Court possessed the means to directly enforce an order compelling the release of prisoners to alleviate overcrowding in California's penitentiaries.⁴²⁵

⁴²⁰ Like the present controversy, many of the Court's past original actions stemmed from a defendant-State's failure to prevent its own private businesses from causing cross-border nuisances. See, e.g., *Vermont*, 417 U.S. at 270–71 (privately owned New York paper mill); *Tennessee Copper II*, 237 U.S. at 475–76 (three private Tennessee copper-smelting businesses); *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 518 (Virginia company operating a private toll bridge over the Ohio River). But these cases typically involved a small number of businesses that were also joined as parties to the action. E.g., *Vermont*, 417 U.S. at 270–71; *Tennessee Copper I*, 206 U.S. at 238; *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 518. Thus, the Court was able to use its contempt powers to directly enforce its judgments without conscripting assistance from the defendant-State's law enforcement. See Cheren, *supra* note 34, at 161 (discussing how the Court has used its contempt powers to enforce judgments against recalcitrant states).

⁴²¹ U.S. CONST. amend. VIII (stating "cruel and unusual punishments" shall not be "inflicted"); see also *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (noting that "the Fourteenth Amendment applies" the Eighth Amendment's "restrictions to the [s]tates"); *Plata*, 131 S. Ct. at 1923 (entering judgment against California because the prohibition against inflicting cruel and unusual punishments is imposed on the states by the Constitution).

⁴²² As the great Henry Hart, Jr. observed, some constitutional rights by their very nature mandate a judicial remedy when violated, but this does not dictate that "the denial of one [particular] remedy, while another is left open," violates the Constitution. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953). The denial of a particular remedy desired by a litigant, in favor of a different remedy, "can rarely be of constitutional dimension." *Id.* This lesson seems to have eluded Nebraska and Oklahoma.

⁴²³ See *Coleman*, 922 F. Supp. 2d at 951 (noting that California could "eliminate overcrowding" by simply "build[ing] more prisons," but implicitly acknowledging that the release order was necessary because commanding state authorities to construct more prisons or expend funds on specific projects were state legislative decisions that fell outside of the judiciary's power).

⁴²⁴ *New York*, 505 U.S. at 161.

⁴²⁵ *Plata*, 131 S. Ct. at 1923.

Likewise, the Court cannot restore marijuana prohibition in Colorado without conscripting the state's police force into federal service.⁴²⁶ But the Court does possess the resources to directly enforce an award of damages.⁴²⁷ Such a judgment falls well within the Court's competence and respects the equal status of Colorado and its sister states as co-sovereigns.

B. The Court Should Look to the Coase Theorem to Fashion an Economically Efficient Remedy for the Cross-Border Trafficking of Colorado Pot

In 1960, Ronald Coase propounded his signature Theorem for Externalities.⁴²⁸ Coase challenged the paradigmatic approach to the law of nuisance. In the years that followed, the Coase Theorem fundamentally altered that field of law.⁴²⁹

Coase's chief criticism of the common law's traditional conception of nuisance is that it viewed such cases two-dimensionally to intrinsically involve "a perpetrator and a victim."⁴³⁰ He posited that every nuisance suit, in fact, involves "a problem of a reciprocal nature"; in every nuisance action there are two potential victims.⁴³¹ To illustrate this point, Coase invoked the example of *Sturges v. Bridgman*,⁴³² an English case decided in 1879, involving a dispute between a doctor and confectioner occupying adjoining lots.⁴³³ The confectioner's business produced noise and vibrations that disturbed the doctor's clinic.⁴³⁴ Coase argued that any resolution would inevitably inflict harm on one of the parties.⁴³⁵ If the court denied the doctor relief, his business would be thwarted.⁴³⁶ On the other hand, "[t]o avoid harming the doctor" by enjoining the confectioner's operation "would inflict harm on the confection-

⁴²⁶ See *Printz*, 521 U.S. at 905.

⁴²⁷ In 1904 in *South Dakota v. North Carolina*, the Court instructed the Supreme Court Marshal to seize and auction railroad stock owned by North Carolina to satisfy a damages judgment awarded to South Dakota. 192 U.S. at 321–22.

⁴²⁸ See Coase, *Social Cost*, *supra* note 68, at 2. Coase was awarded the Nobel Prize in Economic Sciences in 1991 "for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy." *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1991*, NOBELPRIZE.ORG (2014), http://nobelprize.org/nobel_prizes/economics/laureates/1991/ [http://perma.cc/Y2QY-EYTK].

⁴²⁹ See *Coltman v. Comm'r*, 980 F.2d 1134, 1137 (7th Cir. 1992); *Kelman*, *supra* note 69, at 669; *Levy & Friedman*, *supra* note 69, at 493; *Pearl*, *supra* note 69, at 33.

⁴³⁰ Leo Katz, *What We Do When We Do What We Do and Why We Do It*, 37 SAN DIEGO L. REV. 753, 756 (2000).

⁴³¹ Coase, *Social Cost*, *supra* note 68, at 2.

⁴³² *Sturges v. Bridgman* (1879) 11 Ch. D. 852 (Eng.).

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ Coase, *Social Cost*, *supra* note 68, at 2.

⁴³⁶ *Id.*

er.”⁴³⁷ Accordingly, “[t]he real problem” presented by such a case is: “should A be allowed to harm B or should B be allowed to harm A?”⁴³⁸

Coase hypothesized that in the absence of transaction costs, private parties would “negotiate the efficient solution” to such problems.⁴³⁹ For even if the law’s “initial distribution” of rights was “inefficient, the parties [would] simply relocate it through a voluntary transaction.”⁴⁴⁰ This is so because between competing landholders, the enterprise that most efficiently used its property—i.e., generated the most profits—would buy out its less-profitable neighbors.⁴⁴¹ It would contract with them to “share . . . the profits associated with the nuisance . . . in exchange for allowing the nuisance to continue.”⁴⁴²

Of course, transaction costs plague modern life.⁴⁴³ Accordingly, real-world application of Coase’s thesis is only realized by the promulgation of “legal rules that . . . reduce transaction costs and provide incentives for efficient . . . use [of resources].”⁴⁴⁴ Federal judge and scholar Guido Calabresi argued that courts should promulgate rules that produce the same outcomes that would result in Coase’s transaction-cost-free environment.⁴⁴⁵ As one commentator summarized, in Calabresi’s view, “the role of the law is to make rules that approximate the results in Coase’s utopia as closely and cheaply as possible.”⁴⁴⁶

In some cases, equitable considerations counsel against affording a burdened party any remedy—for example, when someone decides to build a home next to an airport.⁴⁴⁷ But when equitable principles do not favor one

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ Meurer, *supra* note 70, at 952.

⁴⁴⁰ Christopher Jon Sprigman et al., *What’s a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389, 1433 (2013).

⁴⁴¹ Fisch, *supra* note 71, at 226 n.205; Sprigman et al., *supra* note 440, at 1433–34.

⁴⁴² Dogan & Young, *supra* note 68, at 114 n.31.

⁴⁴³ Coase did not contend that a transaction-cost-free world is possible. Rather, he “was trying to demonstrate the danger of legal rules that have the opposite effect of raising transactions costs and of inhibiting the flow of information, two adverse conditions that combine to undermine allocative efficiency.” Maxwell L. Stearns, *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on Hollingsworth and Windsor*, 65 ALA. L. REV. 349, 378 n.78 (2013).

⁴⁴⁴ Megan Hennessy, *Colorado River Water Rights: Property Rights in Transition*, 71 U. CHI. L. REV. 1661, 1681 (2004).

⁴⁴⁵ Calabresi, *Transaction Costs*, *supra* note 74, at 69.

⁴⁴⁶ Bulloch, *supra* note 74, at 307 n.29 (1986) (citing Calabresi, *Transaction Costs*, *supra* note 74, at 69).

⁴⁴⁷ As one commentator noted:

Permitting the homeowner to recover [in such a situation] would subject many useful enterprises to extortion. People would seek out airports, industrial sites, manufacturing plants, farms, dumps, and all manner of vital but unpleasant commercial undertakings, and extort damages from them by setting up homes and day care cen-

neighbor's use of its property over the other's,⁴⁴⁸ rules awarding damages to afflicted neighbors most closely approximate the manner in which such disputes would be resolved in Coase's transaction-cost-free environment.⁴⁴⁹

As Calabresi observed, a polluter should be charged "with the damages it cause[s] and, if [it can] pay them and still stay in business," the "market place" has demonstrated that "the benefits derived from" the enterprise are "sufficiently great to justify its existence."⁴⁵⁰

Conversely, if forcing the polluter to internalize the cost of its pollution drives it out of business, "the same effect would be achieved as when a nuisance is enjoined."⁴⁵¹ Such a result likewise reflects a judgment by the marketplace that the polluter's enterprise was not the most economically efficient use of the property and its interests should yield to that of its neighbors.⁴⁵² This is so because the polluter's prior success was premised on the fact that the costs resulting from the negative externalities produced by its business were "simply passed on to others who, by absorbing the loss, subsidize[d] that activity."⁴⁵³ The polluter was a "free-rider"—one who enjoys all of the benefits of an activity while substantial costs are borne by others.⁴⁵⁴

A legal rule awarding damages to negatively affected neighbors best approximates the transaction-cost-free outcome because it enables the most profitable of the competing enterprises to prevail, but at the same time requires it to "share . . . the profits associated with the nuisance" with its neighbors "in exchange for allowing the nuisance to continue."⁴⁵⁵ Such a rule allows the free market to determine which of the competing neighbors' enterprises is most advantageous.

ters in their way. This is called "coming to the nuisance," and the law bars recovery to such cases. Without this restriction, no enterprise would be safe, and no one would have an incentive to invest in necessary and otherwise profitable though unpleasant industries.

Howard Gensler, *Property Law as an Optimal Economic Foundation*, 35 WASHBURN L.J. 50, 62 (1995).

⁴⁴⁸ See Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 115 (2006) ("States interpret the coming to the nuisance doctrine under traditional principles of equity.").

⁴⁴⁹ See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871–73 (N.Y. 1970) (awarding damages to homeowners exposed to "dirt, smoke, and vibration" emanating from a neighboring cement plant because shutting down the plant would have had a devastating impact on the local economy).

⁴⁵⁰ Calabresi, *Some Thoughts on Risk Distribution*, *supra* note 75, at 534–35.

⁴⁵¹ *Id.*

⁴⁵² See *id.*

⁴⁵³ Grunow, *supra* note 77, at 1285 n.131.

⁴⁵⁴ Schenck, *supra* note 78, at 335 ("Free-riding occurs when some parties bear the costs of an action, while others, the free-riders, bear no burden, but still enjoy the benefits.").

⁴⁵⁵ Dogan & Young, *supra* note 68, at 114 n.31.

Calabresi's corollary to the Coase Theorem offers the best solution to interstate disputes concerning marijuana. It recognizes that Colorado and its neighbors are co-sovereigns in which the Constitution invests equal respect and dignity.⁴⁵⁶ Like the doctor and confectioner in *Sturges v. Bridgman*, Colorado's marijuana-legalization experiment involves "a problem of a reciprocal nature."⁴⁵⁷

If the Court enjoins Colorado's experiment—as Nebraska and Oklahoma demand—the decision will implicate Coase's central criticism of the historical law of nuisance. The problem will be reduced to the question of whether Colorado should "be allowed to harm" its neighbors or whether they should "be allowed to harm [it]."⁴⁵⁸ If Colorado is allowed to proceed with its venture the flow of illicit marijuana across state lines will inflict harm on surrounding states.⁴⁵⁹ On the other hand, if its experiment is enjoined, a sovereign choice made by the state's voters will be thwarted.⁴⁶⁰ The solution that best respects the sovereignty of all involved is not to paternalistically overturn Colorado's decision, but to force it to internalize the cost of the externalities produced by its venture.⁴⁶¹ Externalities, "the creation of smoke, noise, [and] smells,"⁴⁶²—or in the present case, dependency,⁴⁶³ diminished cognitive function,⁴⁶⁴ greater need for socioeconomic assistance,⁴⁶⁵ crime,⁴⁶⁶ and traffic fatalities⁴⁶⁷—are transaction costs that the polluter should bear. The Court's role is to fashion rules that ensure "what [i]s gained" by one's use of territory "[i]s worth more than what [i]s lost."⁴⁶⁸

To that end, the Court should award sufficient damages to prevailing sister states to compensate them for the harm inflicted by Colorado's exper-

⁴⁵⁶ See *Kansas v. Colorado (Kansas II)*, 206 U.S. 46, 97–98 (1907) ("One cardinal rule, underlying all the relations of the [s]tates to each other, is that of equality of right. Each [s]tate stands on the same level with all the rest . . .").

⁴⁵⁷ See Coase, *Social Cost*, *supra* note 68, at 2.

⁴⁵⁸ See *id.*; see also W. David Ball, *Is the Nebraska/Oklahoma Pot Suit Preempted?*, JURIST (Mar. 17, 2015), <http://jurist.org/forum/2015/03/david-ball-marijuana-law.php> [<http://perma.cc/Z7FP-GXBK>] ("On a more basic level there are questions of equity and federalism, and it is difficult to figure out who the wronged party is here. Is Colorado imposing its marijuana policies on Oklahoma and Nebraska, or are Oklahoma and Nebraska imposing their policies on Colorado?").

⁴⁵⁹ See *supra* notes 182–212 and accompanying text (detailing the various harms that Colorado's marijuana legalization will inflict on surrounding states).

⁴⁶⁰ See COLO. CONST. art. XVIII, § 16 (legalizing personal use and regulation of marijuana in Colorado).

⁴⁶¹ See Coase, *Social Cost*, *supra* note 68, at 44 (detailing Coase's Theorem for Externalities).

⁴⁶² *Id.*

⁴⁶³ Volkow et al., *supra* note 64, at 2219.

⁴⁶⁴ *Id.* at 2221.

⁴⁶⁵ *Id.*; accord Budney & Stanger, *supra* note 351, at 8.

⁴⁶⁶ Volkow et al., *supra* note 64, at 2221.

⁴⁶⁷ See *supra* notes 200–208 and accompanying text (providing evidence that out-of-state consumers are substantially contributing to highway deaths).

⁴⁶⁸ Coase, *Social Cost*, *supra* note 68, at 44.

iment. Colorado reaped \$53 million in tax revenue last year from its marijuana venture.⁴⁶⁹ It is expected to collect another \$69 million this year.⁴⁷⁰ Allowing it to retain these profits while requiring its neighbors to shoulder the losses caused by that venture makes Colorado a free-rider.⁴⁷¹

We hope that adoption of our market-driven approach will help alleviate the jurisdictional confrontations that will likely follow from state-by-state marijuana legalization.⁴⁷² If states opposing Colorado's wide-open pot market are left with no other remedy "the door will be opened" to many of the "rivalries and reprisals" that the Constitution was designed to avert.⁴⁷³ States may engage in warrantless profiling of vehicles, subjecting drivers suspected of carrying Colorado pot to pretextual stops.⁴⁷⁴ The Supreme

⁴⁶⁹ Lobosco, *supra* note 367.

⁴⁷⁰ Josh Barro, *Why Marijuana Taxes Won't Save State Budgets*, N.Y. TIMES (Apr. 9, 2015), http://www.nytimes.com/2015/04/09/upshot/09up-marijuana.html?abt=0002&abg=1&_r=0 [http://perma.cc/K3HJ-FZR4].

⁴⁷¹ Admittedly, a rule forcing polluters to internalize the cost of their pollution *in dollar terms* flies in the face of traditional nuisance law, for which injunctive relief was historically the exclusive remedy. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 17 (2011). Authorities "strongly recommend the use of damages rather than injunctions." A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1076 (1980). But until recent decades "there [wa]s no recorded instance . . . of any public nuisance action initiated by public officials yielding an award of damages." Merrill, *supra*, at 17. Injunctive relief produces inefficient results. Injunctions are blunt instruments that cannot be tailored to match the specific economic consequences of particular conduct. Polinsky, *supra*, at 1077–78. This inevitably leads to the so-called "extortion problem." *Id.* This occurs when the "cost that enforcement of [an] injunction would impose on the defendant exceeds the loss borne by the plaintiff if the activity in question occurs." *Id.* As one commentator explained, "[s]uppose . . . operation of a plant injures a pollutee by \$1000 while the polluter would lose \$10,000 in profits if the plant were shut down by an injunction." *Id.* An injunction enables the plaintiff to "exact compensation well in excess of his actual damages" because the defendant will "pay up to his [or her] entire potential profit to prevent the shutdown." *Id.* In contrast, a damage award limits the plaintiff's recovery to \$1000, "leaving no scope for extortion." *Id.*

⁴⁷² We believe that the negotiation of binding interstate compacts between marijuana-prohibition states and marijuana-legalization states would provide the best long-term solution to the extraterritorial problems posed by piecemeal marijuana legalization. "An interstate compact . . . is nonetheless essentially a contract between the signatory [s]tates." *Oklahoma v. New Mexico*, 501 U.S. 221, 242 (1991); *accord* *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2123 (2013) ("[I]nterstate compacts are construed under contract-law principles . . ."). To be enforceable Congress must approve such a compact. U.S. CONST. art. I, § 10, cl. 3. Given the often less-than-stately behavior of recent Congresses, obtaining the requisite approval might be a tall order. See Chad DeVeaux, *The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of Youngstown Steel*, 47 CONN. L. REV. 395, 425–32 (2014) (discussing historically unprecedented congressional dysfunction during the Obama Administration).

⁴⁷³ See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

⁴⁷⁴ See Alison Noon, *Colorado Man Sues Idaho Police Over "License-Plate Profiling" in Marijuana Case*, DENVER POST (Mar. 29, 2014), http://www.denverpost.com/news/ci_25449678/colorado-man-sues-idaho-police-over-license-plate [http://perma.cc/2TJN-UECU] ("Darien Roseen filed the federal lawsuit Wednesday in the District of Idaho, more than a year after he said he was unlawfully detained and searched for marijuana on the basis of his Colorado license plates.").

Court unanimously held that such stops are immune from Fourth Amendment scrutiny so long as they are precipitated by the slightest infraction.⁴⁷⁵

Anti-pot states may attempt to apply their own laws to marijuana sales in neighboring jurisdictions. Such extraterritorial application of state law is not without precedent. In its 1976 opinion in *Bernhard v. Harrah's Club*, the California Supreme Court applied the state's dram-shop law to a Nevada casino in contravention of Nevada's own law, which explicitly exempted alcohol vendors from such liability.⁴⁷⁶ By this logic, Nebraska could apply a "gram-shop act" to Colorado marijuana vendors.⁴⁷⁷ We believe that such extraterritorial application of state law violates the dormant Commerce Clause.⁴⁷⁸ But many scholars disagree with our assessment.⁴⁷⁹ Indeed, last July, the U.S. Court of Appeals for the Tenth Circuit held that the Constitution permits a state to directly regulate activities beyond its borders that produce substantial effects within the state.⁴⁸⁰ The court addressed Supreme Court precedents positing that the dormant Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside the [s]tate's borders, whether or not the commerce has effects within the [s]tate."⁴⁸¹ Belittling these precedents as "the most dormant doctrine in dormant [C]ommerce [C]ause jurisprudence,"⁴⁸² the Tenth Circuit conclud-

⁴⁷⁵ *Whren v. United States*, 517 U.S. 806, 814–15 (1996).

⁴⁷⁶ *Bernhard v. Harrah's Club*, 546 P.2d 719, 724–25 (Cal. 1976), *superseded by statute*, 2002 Cal. Legis. Serv. Ch. 906 (West) (amending the Civil Code to abrogate *Bernhard v. Harrah's Club*); *see also* *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 668 (7th Cir. 1986) (holding Wisconsin possessed personal jurisdiction over a Minnesota fireworks distributor based on its sale of products that were legal in Minnesota but illegal in Wisconsin because it profited from sending fireworks to a neighboring state where it knew that fireworks were illegal); *Shaw v. LDC Enters.*, 863 N.E.2d 424, 432 (Ind. Ct. App. 2007) (affirming application of Indiana's common law of nuisance to an Illinois bar suspected of serving underage students in contravention of contrary Illinois policy).

⁴⁷⁷ "Gram-shop" laws impose civil liability on those who sell drugs in a manner analogous to liability imposed on alcohol vendors under dram-shop statutes. Michael E. Bronfin, "*Gram Shop*" Liability: Holding Drug Dealers Civilly Liable for Injuries to Third Parties and Underage Purchasers, 1994 U. CHI. LEGAL F. 345, 345.

⁴⁷⁸ *See* DeVeaux, *supra* note 22, at 1015–28 (arguing that the dormant Commerce Clause prohibits states from applying their own laws to extraterritorial conduct).

⁴⁷⁹ *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789, 806 (2001) (arguing that states have the power to regulate extraterritorial conduct that causes harm within the state); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1908–09 (1987) (same); Mark D. Rosen, "Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 718 (2007) (same).

⁴⁸⁰ *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015), *petition for cert. filed*, 2015 WL 4174876 (U.S. Oct. 9, 2015) (No. 15-471).

⁴⁸¹ *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336, (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion)).

⁴⁸² *Epel*, 793 F.3d at 1170.

ed that they are no longer good law.⁴⁸³ Because this holding conflicts with those in other circuits, the Supreme Court will likely be called upon to resolve the circuit split.⁴⁸⁴

In addition to concerns over the extraterritorial application of state law, we fear that denying states strongly committed to thwarting the marijuana trade any relief may further exacerbate the high incarceration rate in those states.⁴⁸⁵ “The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation . . . do not provide sufficient deterrence,” ordinarily lawmakers will conclude that “those sanctions should be made more severe.”⁴⁸⁶ Although we have misgivings about marijuana legalization, we believe some states have overacted by imposing draconian punishments for the possession of small quantities of the drug.⁴⁸⁷ But lawmakers in these states disagree with us.⁴⁸⁸ If Colorado and other states embracing the marijuana trade are given no incentive to prevent marijuana from spilling over their porous borders, neighboring states are likely to exact even more severe penalties.⁴⁸⁹

⁴⁸³ *Id.* at 1174–75.

⁴⁸⁴ Indeed, appellants filed for certiorari in October 2015, as the Supreme Court’s existing precedent does not coherently settle this issue. *See supra* note 480 and accompanying text; *accord* Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 638 (2007) (stating “[i]t is not wholly clear” that Supreme Court decisions “proscribing extraterritorial state legislation applies categorically to all cases”); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1062 (2009) (“State legislatures appear to be subject to some prohibition against enacting laws with an extraterritorial reach [while] state courts enjoy great apparent latitude to apply the law of their choosing to geographically far-flung disputes.”).

⁴⁸⁵ *See* Anjelica Cappellino & John Meringolo, *The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences*, 77 ALB. L. REV. 771, 772 (2014) (citing THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1 (2013), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf [<http://perma.cc/UHD3-MVT7>]) (noting that “the United States has the largest incarceration rate in the world”).

⁴⁸⁶ *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).

⁴⁸⁷ *See, e.g.*, IDAHO CODE § 37-2732(e) (2010) (providing that possession of more than three ounces of marijuana is punishable by imprisonment for up to five years in the state penitentiary).

⁴⁸⁸ *See* Bob Bernick, *Poll: Idaho Residents Overwhelmingly Oppose Legalizing Marijuana*, IDAHO POLITICS WEEKLY (Feb. 9, 2015), <http://idahopoliticsweekly.com/politics/90-poll-idaho-residents-overwhelmingly-oppose-legalizing-marijuana> [<http://perma.cc/LLE8-RMP4>]; Adam Cotterell, *Why Medical Marijuana Legalization Has No Traction in Idaho*, BOISE ST. PUB. RADIO (Mar. 19, 2014), <http://boisestatepublicradio.org/post/why-medical-marijuana-legalization-has-no-traction-idaho> [<http://perma.cc/74J5-GTAC>].

⁴⁸⁹ In response to the influx of Colorado marijuana, Nebraska’s legislature recently considered a bill that would upgrade possession of “‘ingestible’ marijuana products—including food, candy and drinks” to a felony. David Hendee, *Nebraska Lawmakers Offer Bills on Handling Pot Spillover from Colorado*, OMAHA WORLD-HERALD (Jan. 26, 2015), http://www.omaha.com/news/nebraska/nebraska-lawmakers-offer-bills-on-handling-pot-spillover-from-colorado/article_c71ce39-6d05-5b8b-8b6a-0a46af20bab0.html [<http://perma.cc/A55N-ZQXS>]; *see also* Andrew M

Adoption of our approach may ease tensions in some of the more conservative corners of the country by leaving it to the market to judge the merits of marijuana legalization. If the Supreme Court awards a prevailing state damages, the success or failure of Colorado's experiment will turn on which of the two competing approaches—legalization or prohibition—is most economically efficient. As the Supreme Court said in its very first original nuisance action, the outcome of such controversies should turn on "whether the benefit conferred" by the defendant-State's enterprise "is not greater than the injury done" to the plaintiff-State.⁴⁹⁰ If, after compensating its neighbors for the harm it causes, Colorado still realizes a profit, the marketplace will have determined that "the benefits derived from" its venture are "sufficiently great to justify its existence,"⁴⁹¹ and more states will likely emulate its approach. The dispute will be resolved, in effect, by awarding Colorado's neighbors a "share of the profits" its pot market creates "in exchange for allowing the nuisance to continue."⁴⁹² The free market will have concluded "what [i]s gained" by the decriminalization of recreational pot "[i]s worth more than what [i]s lost."⁴⁹³

But if forcing Colorado to assume responsibility for the extraterritorial costs of its venture results in a net loss, its enterprise will prove inefficient and Colorado will likely decide on its own to terminate its experiment, thus achieving "the same effect" as if the nuisance had been enjoined in the first place.⁴⁹⁴

CONCLUSION

Popular culture—in its uncritical embrace of the pot-legalization movement⁴⁹⁵—all too often categorizes opponents of Colorado's experiment as prudes⁴⁹⁶ who naively view marijuana as a pestilence that makes

Harris, *Marijuana Law Mayhem Splits U.S. as Travelers Get Busted*, BLOOMBERG (Aug. 22, 2014), <http://www.bloomberg.com/news/articles/2014-08-22/marijuana-law-mayhem-splits-u-s-in-two-as-travelers-get-busted> [<http://perma.cc/RX6X-YL5W>] (discussing recent uptick in prosecution of travelers from marijuana-friendly states by jurisdictions opposed to marijuana legalization).

⁴⁹⁰ *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 577.

⁴⁹¹ Calabresi, *Some Thoughts on Risk Distribution*, *supra* note 75, at 534–35.

⁴⁹² See Dogan & Young, *supra* note 68, at 114 n.31.

⁴⁹³ See Coase, *Social Cost*, *supra* note 68, at 44.

⁴⁹⁴ See Calabresi, *Some Thoughts on Risk Distribution*, *supra* note 75, at 534–35.

⁴⁹⁵ Mauer, *supra* note 5, at 701 (stating that "we have marijuana being celebrated in popular culture").

⁴⁹⁶ See Matt Ferner & Nick Wing, *The 11 Stupidest Arguments Against Legalizing Marijuana*, HUFFINGTON POST (Apr. 20, 2014), http://www.huffingtonpost.com/2014/04/20/stupid-arguments-against-legalizing-marijuana_n_5175880.html [<http://perma.cc/ZG6X-62M5>] (asserting that marijuana-legalization opponents have premised their position in part on fears that "[l]egalization will cause mass zombification").

users “hear[] light and see[] sound.”⁴⁹⁷ This crude caricature belies a deeper and much more nuanced truth. Big Cannabis has done a remarkable job branding its constituents as entrepreneurs and job-creators.⁴⁹⁸ But Colorado’s venture is no free lunch. Marijuana is a vice, and its commercial exploitation comes at a price: dependency,⁴⁹⁹ diminished cognitive function,⁵⁰⁰ traffic deaths,⁵⁰¹ and organized crime.⁵⁰² These externalities are accompanied by transaction costs that everyone—users and nonusers—must pay: higher healthcare premiums,⁵⁰³ decreased productivity,⁵⁰⁴ greater need for socioeconomic assistance,⁵⁰⁵ increased burdens on our schools,⁵⁰⁶ law enforcement,⁵⁰⁷ and court systems,⁵⁰⁸ and more highway deaths.⁵⁰⁹ One can acknowledge these harmful side effects without recycling propaganda from the past.⁵¹⁰

From a policy standpoint, we express no opinion regarding whether marijuana legalization is a good policy choice. We simply posit that along with the wealth it generates, Colorado’s marijuana-legalization experiment produces harmful externalities that transcend the state’s borders. Under the

⁴⁹⁷ THE NAT’L ORG. FOR THE REFORM OF MARIJUANA LAWS, NORML REPORT ON SIXTY YEARS OF MARIJUANA PROHIBITION IN THE U.S. 3 (2003), http://www.norml.com/pdf_files/NORML_Report_Sixty_Years_US_Prohibition.pdf [<http://perma.cc/CW47-4ASX>] (citing LESTER GRINSPOON, MARIHUANA RECONSIDERED 11, 17 (2d ed. 1994)). A 1930s public service campaign contended that “a user of marijuana ‘becomes a fiend with savage or ‘cave man’ tendencies. His sex desires are aroused and some of the most horrible crimes result. He hears light and sees sound. To get away from it, he suddenly becomes violent and may kill.”” *Id.*

⁴⁹⁸ See Carroll, *supra* note 6; Matt Ferner, *Colorado Recreational Weed Sales Top \$14 Million in First Month*, HUFFINGTON POST (Mar. 10, 2014), http://www.huffingtonpost.com/2014/03/10/colorado-marijuana-tax-revenue_n_4936223.html [<http://perma.cc/3UJ8-LF8W>]; Aaron Smith, *Colorado Stash: \$184M in Marijuana Taxes*, CNN MONEY (Feb. 20, 2014), <http://money.cnn.com/2014/02/20/news/economy/marijuana-taxes-colorado/> [<http://perma.cc/6TG6-3W9W>].

⁴⁹⁹ Volkow et al., *supra* note 64, at 2219.

⁵⁰⁰ *Id.* at 2221.

⁵⁰¹ See *supra* notes 200–208 and accompanying text (providing evidence that marijuana tourism may contribute to traffic deaths).

⁵⁰² See *supra* notes 207–208 and accompanying text (announcing busts of marijuana trafficking ring in Colorado).

⁵⁰³ See Andre et al., *supra* note 362, at 1.

⁵⁰⁴ Volkow et al., *supra* note 64, at 2221.

⁵⁰⁵ *Id.*; accord Budney & Stanger, *supra* note 351, at 8.

⁵⁰⁶ See Volkow et al., *supra* note 64, at 2221 (noting that marijuana use results in “long-lasting cognitive impairments” which inhibit learning and achievement).

⁵⁰⁷ See *supra* notes 182–184 and accompanying text.

⁵⁰⁸ Volkow et al., *supra* note 64, at 2221 (“[M]arijuana use has been linked to . . . criminal behavior.”).

⁵⁰⁹ LEGALIZATION OF MARIJUANA IN COLORADO, VOL. 1, *supra* note 186, at 5.

⁵¹⁰ See Mike Konczal, *Legalizing Marijuana Is Hard. Regulating a Pot Industry Is Even Harder*, WASH. POST WONKBLOG (June 29, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/29/legalizing-marijuana-is-hard-regulating-a-pot-industry-is-even-harder/> [<http://perma.cc/K45C-CTCG>] (discussing the negative externalities faced by sovereigns that legalize recreational marijuana use).

Constitution's federalist covenant, Colorado's right to embrace commercial marijuana is no greater than the right of its neighbors to be free from the transboundary harm Colorado pot generates.

At the same time, we reject Nebraska's and Oklahoma's attempt to utilize the blunt instrument of a federal injunction to commandeer Colorado's legislature and police force. The best way to resolve this impasse is to allow Colorado to retain the policy of its choice, but force it to compensate surrounding states for any damage caused. This remedy recognizes that Colorado and its neighbors are co-sovereigns in whom the Constitution invests equal respect and dignity.⁵¹¹ It simply requires Colorado—the policy outlier—to make the extraterritorial externalities that result from its lucrative experiment part of its cost of doing business. Such a remedy leaves it to the free market to ultimately decide which of the competing states' policies should prevail.

⁵¹¹ *Kansas II*, 206 U.S. at 97–98 (“One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest.”).